
Of Planets and the Universe: Self-contained Regimes in International Law

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Abstract

*Contemporary legal practice requires the allocation of authority within a complex system of legal prescriptions. As international law has extended to areas as diverse as trade, environmental regulation and human rights, the consequences of breach of international legal obligations become more difficult to assess. The authors probe the role of the *lex specialis maxim* as a tool for the effective placing of special secondary rules within the general international law of state responsibility. The central question is: Are the general rules on state responsibility to apply residually? The authors answer in the affirmative. ‘Conceptual’ arguments for so-called self-contained regimes are unconvincing. Scholars who perceive international law as a unified legal order might be led to apply a presumption in favour of the applicability of the general international law of state responsibility. Scholars who regard international law as no more than the sum total of loosely interrelated subsystems tend to advocate a presumption in favour of the normative closure of a particular regime. In the authors’ view, neither presumption is helpful, since both tend to obfuscate the value judgments that legal decision-making inevitably involves. Instead, the authors propose that a fallback on general international law, including resort to countermeasures, may be justified on normative grounds. A closer analysis of four subsystems that have often been associated with the notion of self-contained regimes – diplomatic law, European Community law, the WTO and human rights – concludes the discussion.*

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1 Self-contained Regimes: A Classic Revisited

The needs of an increasingly interconnected and functionally diversified society have radically transformed the international legal order. Early 20th-century accounts conceived of the international system as a hierarchical pyramid structure comprising relatively few norms, in which states, perceived as opaque and unitary actors ('billiard balls'¹), interacted in a largely unconstrained manner. Contemporary international law, by contrast, resembles a dense web of overlapping and detailed prescriptions in subject areas as diverse as environmental protection, human rights and international trade. In light of such transformations, political and legal theorists have introduced the concept of the network as a competing structural paradigm of the legal order; they describe international law as a network of government officials, legislators and judges;² as a deterritorialized 'system of rule' that has transformed the state;³ or as a flexible, horizontal structure of production of legitimacy spread throughout world space.⁴ And yet, while the network model accounts for the diversification of legal regimes and the multiplication of actors in the international legal process, many central building blocks of the traditional international legal system, such as the rules on diplomatic protection or state responsibility, have remained remarkably stable. Thus, François Ost and Michel van de Kerchove have aptly noted that '*de la crise du modèle pyramidal, émerge progressivement un paradigme concurrent, celui du droit en réseau, sans que disparaissent pour autant des résidus importants du premier*'.⁵ A central, and increasingly difficult task of the jurist consists in allocating authority in a system composed of both elements of hierarchical unity and multiple network structures in diverse issue areas.

The present article focuses on the multiplication of norms in the field of state responsibility. Numerous recent treaty instruments contain tailor-made rules on the legal consequences of breach. On the one hand, such special treaty regimes provide innovative procedures of dispute settlement, surveillance and reporting, leading to remedies that did not previously exist under general international law. On the other hand, the secondary rules of special regimes are often less comprehensive than the established canon of rules on state responsibility. Hence, international lawyers cannot escape the question of how such special secondary rules concerning the consequences of breach of international legal obligations relate to the general international law of state responsibility. Are the rules on state responsibility to apply residually? Such a residual fallback on the rules on state responsibility is controversial with regard to subsystems that have attained a particularly high degree of regulatory

¹ The metaphor is attributed to Arnold Wolfers. A. Wolfers, *Discord and Collaboration: Essays on International Politics* (1962), at 19–24.

² A.-M. Slaughter, *A New World Order* (2004).

³ S. Sassen, *Losing Control? Sovereignty in an Age of Globalization* (1995), at xv, 25.

⁴ M. Hardt and A. Negri, *Empire* (2000), at 13.

⁵ F. Ost and M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (2002), at 14. 'From the crisis in the pyramid model, a competing paradigm – that of law as network – is progressively emerging, although important residues of the former do remain.'

'thickness' and, thus, autonomy. The more a system's operation is 'closed' towards its international law environment, the less likely it is to fall back on the rules on state responsibility.

More than 20 years ago, in the 1985 *Netherlands Yearbook of International Law*, one of the present authors raised the question whether self-contained regimes in the area of state responsibility were conceivable.⁶ The regimes of diplomatic law, the law of the European Communities and human rights instruments, among others, contain special rules concerning the consequences of breaches of their respective primary norms. They thus present potential candidates for autonomous systems decoupled from general international law. That earlier study concluded, however, that completely closed regimes of secondary rules were neither conceivable nor desirable. Since 1985, the problem has lost not a shade of its topicality. While some old trenches have continued virtually unchanged for 20 years (as regards, for example, the debate on the conceptual possibility of self-contained regimes), other, new academic battlefronts have opened up. The increasing academic interest in the diversification of the international legal order has given the debate additional fresh impetus. Thus, we consider that it is time to revisit the topic of self-contained regimes in the light of this broader discussion on the alleged fragmentation of international law.

This article probes the role of the *lex specialis* maxim as a tool for networking 'traditional' international law and 'new' subsystems of international law. As international law has evolved into an elaborate, but fragmented, structure, in which multiple regimes govern the legal consequences of breach, the conceptual distinction between general and special laws remains important for maintaining systemic cohesion. In principle, the special secondary rules of the regime will prevail. Yet, to the extent that such rules are inexistent or ineffective, the general rules on state responsibility will remain applicable. Sociological regime differentiation does not preclude normative compatibility with general international law. It would be too simple, however, to assert that a fallback on general international law follows 'automatically' from a mechanical application of the *lex specialis* maxim. Rather, normative considerations are ultimately decisive. What has been laid down in a special treaty must be deemed to embody a particularly strong commitment. The principle of effective interpretation thus requires that special primary obligations be interpreted as being enforceable. If the rules and procedures of special systems fail, a fallback on general international law, including resort to countermeasures, is justified.

2 Special Rules in the Field of State Responsibility

A *The lex specialis Principle*

In the 1953 *British Yearbook of International Law*, William Jenks observed that 'the conflict of law-making treaties . . . must be accepted as being in certain circumstances an inevitable incident of growth' of international law. Jenks urged the international

⁶ Simma, 'Self-Contained Regimes', XVI *Netherlands Ybk* (1985) 111.

lawyer ‘to formulate principles for resolving such conflict when it arises’.⁷ In the five decades following Jenks’ visionary article, international law has witnessed an even more radical process of functional specialization. As a reaction to such specialization, one conflict rule in Jenks’ sense that has increasingly moved to the centre of (mostly academic) attention is the maxim *lex specialis derogat legi generali*.⁸

The Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) in 2001 equally conceptualize the relationship between general international law and secondary norms contained in the proliferating new regimes of international law in terms of a general/special distinction. The provision of Article 55, titled *lex specialis*, is designed to open the door to such special sets of secondary rules:

Article 55 (lex specialis)

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law.⁹

While the wording of Article 55 is short and straightforward, it is both one of the most important and most debatable provisions of the ILC’s Articles.

1 *Rationale of the lex specialis Rule*

The option of complementing international obligations with a specific set of secondary rules is a prerogative inherent to the idea of sovereignty. No state is forced to adhere to a ‘one-size-fits-all’ approach to state responsibility.¹⁰ In most instances, the sovereign will of states will be expressed in special treaty provisions. It is not to be

⁷ Jenks, ‘Conflict of Law-Making Treaties’, 30 *BYIL* (1953) 401, at 405.

⁸ To name but a few recent book publications, W. H. Wilting, *Vertragskonkurrenz im Völkerrecht* (1996); J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003); J. Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen: Konflikte des materiellen Rechts und Konkurrenzen der Streitbeilegung* (2002). Cf. also the International Law Commission’s treatment of the notion of *lex specialis*, M. Koskenniemi, ‘Study on the Function and Scope of the *lex specialis* Rule and the Question of “Self-Contained Regimes”’, Preliminary Report by the Chairman of the Study Group submitted for consideration during the 2004 session of the International Law Commission, Doc. ILC(LVI)SG/FIL/CRD.1 and Add. 1, available from the Codification Division of the UN Office of Legal Affairs.

⁹ International Law Commission, *Report on the Work of its Fifty-third Session, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10)*, at 58.

¹⁰ In terms of sources doctrine, the *lex specialis* principle has been categorized either as a general principle of international law, as a rule of customary international law, or as a principle of legal logic. As the International Tribunal for the Law of the Sea has pointed out, the *lex specialis* principle was referred to as an example of a general principle in the drafting process of Article 38 of the Statute of the PCIJ, cf. *Southern Bluefin Tuna*, ITLOS Order of 27 August 1999, para. 123; cf. also Neumann, *supra* note 8, at 86. Scholars who refer to the *lex specialis* rule as a principle of treaty interpretation tend to consider it as a rule of customary international law, cf. the dissenting opinion of Judge Hsu in the *Ambatielos* case, ICJ Reports (1952), at 87 *et seq.*; R. Jennings and A. Watts, *Oppenheim’s International Law* (1992), at 1280. Other authors speak of a principle of legal logic, Pauwelyn, *supra* note 8, at 388. Finally, G. Schwarzenberger has referred to the principle as merely a ‘tool in aid of the *jus aequum* rule’, *International Law*, vol. I, (3rd ed. 1957) 496.

excluded, however, that special secondary rules may be established by particular (for example, regional) custom.¹¹

Either way, the *raison d'être* of special secondary norms remains the same. Particular secondary rules are crafted to enhance the efficacy of the primary rules. An early expression of this rationale dates back to Hugo Grotius: '*Inter eas pactiones quae supra dictis qualitatibus pares sunt ut praeferatur quod magis est peculiare, & ad rem propius accedit: nam solent specialia efficaciora esse generalibus.*'¹² Emer de Vattel, a century later, had the following to say on the superior effectiveness of special norms:

*De deux Loix, ou de deux Conventions, toutes choses d'ailleurs égales, on doit préférer celle qui est la moins générale, & qui approche le plus de l'affaire dont il s'agit. Parceque ce qui est spécial souffre moins d'exceptions que ce qui est général; il est ordonné plus précisément, & il paroît qu'on l'a voulu plus fortement.*¹³

Efficacy, for de Vattel, is a consequence of fewer exceptions, more regulatory precision and, most interestingly, the assumption that what has been laid down in a more specific manner carries a stronger expression of state will.

The rule *lex specialis derogat legi generali* has been referred to as a well-recognized principle of international law.¹⁴ Occasionally, the *lex generalis/lex specialis* distinction has played a prominent role in international jurisprudence. The International Court of Justice had occasion to affirm that a treaty concluded between Hungary and Czechoslovakia governed the relations between the parties as a *lex specialis vis-à-vis* the rules of state responsibility.¹⁵ In its *Nicaragua* judgment, the Court ruled that '[i]n general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim'.¹⁶ In its *INA Corporation* decision, the Iran-US Claims Tribunal

¹¹ *Case concerning Right of Passage over Indian Territory (Merits)*, ICJ Reports (1960), 6. Arangio-Ruiz, by contrast, suggested that a derogation from the rules on state responsibility should only be permissible by way of 'contractual instruments', G. Arangio-Ruiz, Fourth Report on State Responsibility, in *ILC Yearbook* (1992), Vol. II Part One, 42.

¹² H. Grotius, *De jure belli ac pacis, libri tres* (1653) Liber II, Caput XVI, § XXIX. 'Among those treaties, which, in the above named respects, are equal, the preference is given to such as are more particular, and approach nearer to the point in question. For where particulars are stated, the case is clearer, and requires fewer exceptions than general rules do.' (Trans. A. C. Campbell, 1814, available at <http://www.constitution.org/gro/djbp.htm>).

¹³ E. de Vattel, *Les droit des gens ou principes de la loi naturelle*, Reproduction of the original 1758 edition (1916) Liv. II, Ch. XVII, § 316. 'Of two laws or two conventions, we ought (all other circumstances being equal) to prefer the one which is less general, and which approaches nearer to the point in question: because special matter admits of fewer exceptions than that which is general; it is enjoined with greater precision, and appears to have been more pointedly intended.' (Trans. J. Chitty, 1883, available at <http://www.constitution.org/vattel/vattel.htm>).

¹⁴ Cf. the dissenting opinion of Judge Hsu in the *Ambatielos* case, ICJ Reports (1952), at 87 *et seq.*: 'It is a well recognized principle of interpretation that a specific provision prevails over a general provision.'; cf. also Jennings and Watts, *supra* note 10, at 1280.

¹⁵ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports (1997), at para. 132.

¹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports (1986), para. 274. The Court continued to argue, however, that Nicaragua was not required to initiate consultations under a bilateral treaty before seizing the Court since such requirement would be 'wholly artificial' and 'excessively formalistic' in the concrete case.

decided that the standard of full compensation laid down in a Treaty of Amity prevailed over the more liberal standard of compensation for nationalization of property under general international law.¹⁷

Nonetheless, case law which makes express reference to the *lex specialis* principle as a tool for determining the relationship between ‘general’ international law and ‘special’ regimes is relatively scarce. One possible explanation would be that reference to a special rule presupposes the perspective of general international law. Thus, both the International Court of Justice and the Claims Tribunal, in a first step, examined the content of the rule of general international law and considered, in a second step, whether states in the particular case had derogated from this standard by creating a more special set of rules. Tribunals established under a special legal subsystem – such as WTO panels or the European Court of Justice – generally follow the reverse order of examination. They are primarily concerned with the content of ‘their’ special law. Only in a second step, if this special regime proves insufficient to resolve a case, is resort had to general international rules. While tribunals working on the basis of general international law resort to the *lex specialis* principle to justify the non-application of general international law, special tribunals are not required to provide a comparable justification for applying the special rules under which they were created.

2 The Relative Character of the *lex specialis* Maxim

At a first, superficial glance, Article 55 of the ILC Articles appears to be a relatively straightforward provision requiring nothing more than an exercise of legal logic. However, the *lex specialis* principle has a few major built-in problems.

Firstly, when exactly can it be said that one rule is more special than another, and how far does that specialness extend? As Sir Gerald Fitzmaurice has observed, ‘[t]he *generalia* rule can only apply where both the specific and general provision concerned deal with the same substantive matter’.¹⁸ Whether a special norm relates to the same subject matter as the state responsibility rules can be problematic. For instance, does a non-compliance procedure under a multilateral environmental agreement (MEA) concern the same subject-matter as the regime of state responsibility? The subject matter of the rules of state responsibility is, in essence, the legal consequences of unlawful conduct. State responsibility, thus deals with consequences of ‘breach’, while the MEA’s regime regulates procedures for the case of ‘non-compliance’. If non-compliance does not necessarily imply unlawfulness, while ‘breach’ does, it would be

¹⁷ *INA Corporation v. Iran*, Iran-US Claims Tribunal, Award No. 184-161-1 of 12 Aug. 1985, 75 *ILR* 1987, para 378.

¹⁸ Fitzmaurice, ‘The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points’, 23 *BYbIL* (1957) 203. In the writings of Anglo-Saxon authors, the maxim is predominantly expressed as *generalia specialibus non derogant* (Jennings and Watts, *supra* note 10, at 1280; Fitzmaurice, *ibid.*, at 236). In substance, both ways of stating the principle refer to the same rule. As Fitzmaurice has pointed out in *ibid.*, the *generalia* rule ‘does not merely involve that general provisions do not *derogate* from specific ones, but also, or perhaps as an alternative method of statement, that a matter governed by a specific provision, dealing with it as such, is thereby taken out of the scope of a general provision dealing with the *category* of subject to which that matter belongs, and which therefore might otherwise govern it as part of that category’.

conceivable to apply the 'hard' state responsibility regime in parallel, because the two sets of norms do not purport to regulate the same subject-matter. Alternatively, it could be argued that both the regime of state responsibility and an MEA's non-compliance procedure spell out consequences of a deviation from normative expectations. Then, the relevant provisions of the MEA could be considered *leges speciales*.

Even in the event that it can be established that a special norm concerns the same subject-matter as the Articles on state responsibility, the question remains as to how far the specialness of that particular norm extends. To give some contentious examples, the question has been raised whether a state can claim retrospective compensation pursuant to the general rules of state responsibility for breaches of WTO law, although the WTO Agreements do not authorize (nor forbid) such compensation. Another question would be whether a violation of EC law can ultimately be addressed by unilateral countermeasures, although the EC Treaty contains a comprehensive dispute settlement machinery.

A second problem with respect to the *lex specialis* principle is that it is based on a particular fiction of unified state conduct. It presumes that states act with a unified legislative will when they conclude treaties or enact customary rules. In other words, the maxim is premised on the 'billiard-ball model' of international law that many theorists consider inadequate or dated. It is simply inconceivable that a state's 'intent' could be directed to both *A* and *non-A* at the same time. As Karl Engisch put it classically, 'nobody can perform an action that is respectively an omission and the contradictory or contrary opposite at the same time. Hence, the will of a commanding person can never be consciously directed at once towards the execution of an action and its opposite, that it be *A* and *non-A*.'¹⁹

Far from corresponding to the fiction of a unified legislative intent, the reality of treaty-making appears to present a rather heterogeneous picture. Treaty negotiations in different subject-matter areas may fall within the competence of different domestic ministries or, at the European level, Directorates General. Moreover, as Martti Koskenniemi noted in his 2004 Preliminary Report for the International Law Commission, the creation of a new international norm may not be as deliberate a process as legal theory suggests. 'There is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives – they are "bargains" and "package-deals" and often result from spontaneous reactions to events in the environment'.²⁰

This observation leads to a third, more general problem concerning the *lex specialis* principle as a rule of treaty interpretation. From a strict rules perspective, the *lex specialis* principle has been characterized as a rule of legal (deontic) logic.²¹ However, if

¹⁹ K. Engisch, *Die Einheit der Rechtsordnung* (1987, facsimile of the original 1935 edition), at 54: 'Niemand kann zugleich eine Handlung bzw. Unterlassung und ihr kontradiktorisches oder konträres Gegenteil prästieren. Deshalb kann auch der Wille eines Befehlenden niemals bewusst darauf gerichtet sein, dass jemand eine Handlung und zugleich ihr Gegenteil vollziehe, daß zugleich *A* und *non A* sei.'

²⁰ Koskenniemi, *supra* note 8, at para. 28.

²¹ Cf. *supra*, note 10 and accompanying text.

we look at how legal decisions are made, this assumption appears doubtful. Lawyers make use of various (and sometimes contradictory) ‘tools’ of interpretation, including the *lex specialis* principle, to reconcile competing rationalities expressed in different rules of law. As Koskenniemi has noted,

[i]nterpretation refers to contested and conflicting principles, none of which can be held superior to the others in a general way. There are no rules on when to apply a literal and when a dynamic interpretation; when to have recourse to party will and when to the instrument’s object and purpose. . . . The arbitrator can resolve the dispute only by leaving the ground of legal interpretation altogether.²²

From a realist perspective, Schwarzenberger thus referred to the principles of treaty interpretation as merely ‘tool[s] in aid of the *jus aequum* rule’.²³ In that sense, their function may resemble what Vaughan Lowe labelled as interstitial norms: ‘The choice is made by the judge not on the basis of the internal logic of the primary norms, but on the basis of extraneous factors’.²⁴ The application of principles of treaty interpretation quite generally is not merely an exercise in legal logic. Nor is the characterization *vel non* of two norms, identified as dealing with the same subject matter, in terms of a special law/general law distinction, a schematic exercise. Whether a prescription is too general to govern a particular case is equally ‘a matter of harmony with what, for want of a better word, one might term experience and common sense [: . . .] an unsystematized complex of moral, cultural, aesthetic, and other values and experiences’.²⁵ The true function of the *lex specialis* principle lies precisely in its capacity to give articulation to such values and experiences of the international decision-maker.

B From *leges speciales* to So-called Self-contained Regimes

1 Self-contained Regimes: A Definition

If we imagine a sliding scale of specialness, one could conceive a rule at one end that is only designed to replace a single provision of the set of rules on state responsibility, while leaving the application of this framework otherwise untouched. At the other end of the scale, a strong form of *lex specialis* could exclude the application of the general regime of state responsibility altogether, either by explicit provision or by implication, that is, by virtue of a regime’s particular structure or its object and purpose. This latter concept of a strong *lex specialis* designed to exclude completely the general international law of state responsibility is what we denote as a ‘self-contained regime’. ILC Article 55 is meant to cover all kinds of special rules, from weaker forms of specialness that only modify the general regime on a specific point to strong forms

²² Koskenniemi, ‘Hierarchy in International Law: A Sketch’, 8 *EJIL* (1997) 566, at 575–576.

²³ Schwarzenberger, *supra* note 10, at 496.

²⁴ Lowe, ‘The Role of Law in International Politics’, in M Byers (ed.), *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?* (2000) 216.

²⁵ *Ibid.*, at 220.

such as self-contained regimes that attempt to exclude the application of the general rules of state responsibility altogether.²⁶

The phrase 'self-contained regime' was coined by the Permanent Court of International Justice in the *S.S. Wimbledon* case. There, the Court was faced with the question whether the provisions of the Treaty of Versailles relating generally to German waterways also applied to the Kiel Canal. The Court pointed out that the drafters of the Treaty had devoted a special section to the Kiel Canal, which differed substantially from the rules relating to other watercourses.²⁷ The Court concluded that

[t]he provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous Sections of Part XII, they would lose their 'raison d'être' . . . The idea which underlies [the specific provisions regarding the Kiel Canal] is not to be sought by drawing an analogy from these provisions but rather by arguing *a contrario*, a method of argument which excludes them.²⁸

In the *Wimbledon* case, the Court applied the concept of self-containment to resolve a question of treaty interpretation concerning the relationship between two sets of primary international obligations.

More recently, the International Court of Justice in its *Tehran Hostages* judgment transposed the concept of self-contained regimes to the level of secondary norms. The Court asserted that the regime of specific legal consequences contained in the Vienna Convention on Diplomatic Relations was self-contained *vis-à-vis* the customary international law of state responsibility. Consequently, in the event of violations of the Vienna Convention, no resort may be had to any of the remedies provided for by general international law, because 'diplomatic law by itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions'.²⁹ After exploring in detail the sanctions contemplated by the Vienna Convention (such as the option of declaring a diplomat *persona non grata*) the Court concluded:

The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to the diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are by their nature, entirely efficacious.³⁰

The concept of self-contained regimes attracted scholarly attention only after the *Tehran Hostages* ruling. Lack of uniform terminology has probably contributed a good deal to the controversial character of the discussion addressing the alleged self-containment of legal sub-systems. Various levels of autonomy have been associated with the term 'self-contained regimes'.

²⁶ ILC, *supra* note 9, at, 359 para 5.

²⁷ *S.S. Wimbledon*, PCIJ, Ser. A, No. 1, at 23.

²⁸ *Ibid.* at 24.

²⁹ *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980), at 38.

³⁰ *Ibid.*, at 40.

First, the notion of ‘self-contained regimes’ has been misconceived as an argument in favour of entirely autonomous legal subsystems. Social systems cannot exist in splendid isolation from their environment. This point is conceded even by ardent proponents of regime specialization. According to Niklas Luhmann’s *Systemtheorie*, for example, all systems are to some extent interlinked by structural coupling.³¹ Similarly, legal subsystems coexisting in isolation from the remaining bulk of international law are inconceivable. There will always be some degree of interaction, at least at the level of interpretation. In the words of the Chairman of the International Law Commission’s Study Group on ‘Fragmentation of International Law’:

No treaty, however special its subject-matter or limited the number of its parties, applies in a normative vacuum but refers back to a number of general, often unwritten principles of customary law concerning its entry into force and its interpretation and application. Moreover, this normative environment includes principles that determine the legal subjects, their basic rights and duties, and the forms through which those rights and duties are modified or extinguished.³²

Without the ‘omnipresence of “general law”’³³ a special legal subsystem may, as Georges Abi-Saab put it, mutate into ‘a legal Frankenstein’ that ‘no longer partakes in the same basis of legitimacy and formal standards of pertinence’.³⁴ Even the European Court of Justice has asserted that principles of general international law are applicable residually within the context of EC law, and has indicated its willingness to defer to the interpretation of an international agreement by a court established under such an agreement.³⁵ In the case of the WTO, the Appellate Body has acknowledged that the GATT remains firmly imbedded in general international law, stating that the Agreement ‘is not to be read in clinical isolation from public international law’.³⁶ Thus, to avoid confusion, the term ‘self-contained regime’ should not be used to circumscribe the hypothesis of a fully autonomous legal subsystem.

Nor should the term be used to describe *leges speciales* at the level of primary rules, although it is precisely in the context of primary rules that the Permanent Court of International Justice had originally introduced the concept. In its original meaning, the concept denoted a set of treaty provisions that cannot be complemented through the application of other rules by way of analogy. After *Tehran Hostages*, however, scholarly debate on self-contained regimes has narrowed down to the specific question of the ‘completeness’ of a subsystem’s secondary rules. Hence, we reserve the term ‘self-contained regimes’ to designate a particular category of

³¹ N. Luhmann, *Die Gesellschaft der Gesellschaft* (1997), at 170, 776, 779. Cf. *infra* for a discussion of fragmentation from the perspective of *Systemtheorie*.

³² Koskeniemi, *supra* note 8, at 7.

³³ *Ibid.*

³⁴ Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’, 31 *NYU J Int’l L Pol* (1999) 919, at 926.

³⁵ Opinion 1/91, *EEA I*, 14 Dec. 1991, [1991] ECR, I-6079, at paras 39 and 40.

³⁶ *US – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 29 Apr. 1996, WT/DS2/AB/R at 17; cf. also: *US – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 6 Nov. 1998, WT/DS58/AB/R, at 154–157.

subsystems, namely those that embrace a full, exhaustive and definitive, set of secondary rules. Thus, the principal characteristic of a self-contained regime is its intention to totally exclude the application of the general legal consequences of wrongful acts as codified by the ILC, in particular the application of countermeasures by an injured state.³⁷

2 Approaches to Self-contained Regimes by the International Law Commission

The International Law Commission's stand with regard to the existence of so-called self-contained regimes concerning state responsibility has varied with each special rapporteur taking up the subject of legal consequences of internationally wrongful acts. In a nutshell, the ILC first appeared to embrace the concept of self-contained subsystems (Riphagen), then became highly critical of the systematic feasibility of such isolation from state responsibility (Arangio-Ruiz), and finally adopted the position of a pragmatic 'maybe' (Crawford).

Special Rapporteur Willem Riphagen's approach was characterized by considerable ambiguity.³⁸ On the one hand, Riphagen charted the international legal system as an order modelled on a variety of distinct subsystems, within each of which primary rules and secondary rules are closely interlinked.³⁹ The regime of state responsibility was perceived as merely part of one such subsystem. Consequently, in the Rapporteur's view, '[t]he idea that there is some kind of least common denominator in the regime of international responsibility must be discarded'.⁴⁰ On the other hand, Riphagen presented scenarios in which 'the subsystem itself as a whole may fail, in which case a fallback on another subsystem may be unavoidable'.⁴¹

In the era of Special Rapporteur Gaetano Arangio-Ruiz, debate concentrated on one, particularly contentious, aspect of self-contained regimes, namely the question whether such a 'so-called self contained regime affect[s], and if so in what way, the rights of the participating States to resort to the countermeasures provided for under general international law'.⁴² Focusing on the admissibility of countermeasures, Arangio-Ruiz concluded that none of the systems envisaged as self-contained regimes⁴³ excluded the application of the rules of state responsibility *in concreto*. The Rapporteur added that, in any event, the very concept of closed legal circuits of

³⁷ Cf. Simma, *supra* note 6, at 117. We thus adopt an autonomous 'international law' definition, which is not identical with Krasner's classical definition of international regimes as 'a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in S. D. Krasner (ed.), *International Regimes* (1983) 2.

³⁸ For a more extensive critique of Riphagen's theoretical approach, cf. Simma, *supra* note 6, at 115–117.

³⁹ Riphagen, 'Third Report on State Responsibility', in *ILC Yearbook* (1982), Vol. II, Part One, at 24 para 16; cf. also Riphagen, 'State Responsibility: New Theories of Obligation in Interstate Relations', in R. St. J. Macdonald, D. M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) 600.

⁴⁰ *ILC Yearbook* (1982), Vol. I, at 201, para. 8.

⁴¹ Riphagen, 'Third Report', *supra* note 39, at 30 para. 54.

⁴² Arangio-Ruiz, *supra* note 11, at 35. Cf. also *ILC Yearbook* (1992), Vol. I, at 76.

⁴³ Among them the European Communities, the GATT, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and diplomatic law.

responsibility rules was dubious even *in abstracto*.⁴⁴ Arangio-Ruiz suggested that the limitations built in the customary international law of state responsibility, most notably the proportionality principle, would suffice to take sufficient account of the peculiarities of subsystems. According to the Rapporteur, countermeasures ‘outside’ a special subsystem’s secondary rules would, in principle, be disproportionate. Consequently, only after all available means within the subsystem are exhausted may states resort to proportionate countermeasures under general international law.⁴⁵ Since Arangio-Ruiz perceived the conflict between special secondary rules and the general rules of state responsibility to be anchored in (and resolved by) the proportionality principle, he proposed the deletion of the *lex specialis* clause in the Draft Articles.

Rather than resolving the conceptual clash between the ILC’s previous rapporteurs, Special Rapporteur James Crawford decided to refer the issue of self-containment of subsystems to another topic that the Commission intended to take up, namely the fragmentation of international law. The commentaries adopted in 2001 remain tacit as to whether a closed responsibility regime outside the customary law of state responsibility is conceptually feasible and, if so, which subsystems may qualify as thus closed. The Commission avoided express recognition of self-contained regimes by diplomatically speaking of “‘strong” forms of *lex specialis*, including what are often referred to as self-contained regimes’.”⁴⁶ Despite such hesitation, the ILC’s final product can still be recognized as a conceptual approximation to the view held by Special Rapporteur Arangio-Ruiz. Admittedly, the Commission preferred the more conventional legislative technique of an express conflict clause over Arangio-Ruiz’s approach of re-interpreting proportionality. In substance, however, the very inclusion of a *lex specialis* clause implies a certain concept of the international legal order. The Commission moved away from Riphagen’s idea of several competing regimes of equal rank and towards Arangio-Ruiz’s concept of a canon of general law that is applicable automatically unless states have specifically contracted out by virtue of a special legal regime.

In its deliberation of the topic ‘The Fragmentation of International Law’, the ILC appears to follow the course thus charted. In the Working Paper elaborated in 2003 by Koskeniemi, Chairman of the Study Group, special subsystems are described as firmly embedded within an omnipresent general international law.⁴⁷

C Concepts of the International Legal Order

Far from being merely caprices by a handful of theory-enthused academics, the distinct theoretical positions taken by the various ILC rapporteurs entail different

⁴⁴ Arangio-Ruiz, *supra* note 11, at 40. Cf. also *ILC Yearbook* (1992), Vol. I, at 77.

⁴⁵ *Ibid.*, at 41, para. 116: “‘External” unilateral measures should thus be resorted to only in extreme cases. . . . In other words, the principle of proportionality will have to be applied in a very special way – and very strictly – whenever the measures resorted to consist in the suspension or termination of obligations deriving from an allegedly self-contained regime.”

⁴⁶ ILC, *supra* note 9, at para. 5.

⁴⁷ Koskeniemi, *supra* note 8, at 7.

answers to the question whether self-contained regimes in the field of state responsibility are conceivable. The principal characteristic of a self-contained regime is its intention totally to exclude the application of the general international law on state responsibility, in particular resort to countermeasures by an injured state. The question that immediately follows in practice is whether such a complete exclusion of all secondary rules of general international law is in fact *intended* by the regime in question.

Whether this question is answered in the affirmative, in turn, may depend on whether international law is conceived as a unified legal order or as the sum total of loosely interrelated subsystems. Scholars adhering to the first – universalistic – concept choose as their starting point the perspective of general international law. Derogation from the general international law on state responsibility is only accepted to the extent that the states parties have clearly stated such an intention. Proponents of this position tend to deny the existence of self-contained regimes. By contrast, scholars adhering to the second – particularistic – concept of international law draw normative conclusions from a somewhat sociological analysis of certain particular regime characteristics. Their analysis is mostly conducted from a perspective within a particular regime. In their view, special regimes tend to appear as self-contained. Hence, the claim of self-containment is intrinsically linked to a particular outlook on the international legal order.

1 *Leges speciales in a Unified Legal Order*

ILC Article 55 is based on a perception of international law shared by many general international lawyers: international law is a unified and, to a certain extent, hierarchical legal order. '*L'unité de l'ordre juridique*', as Pierre-Marie Dupuy named his General Course at the Hague Academy,⁴⁸ is a sociological fact or, at least, a normative postulate.⁴⁹ Unity, according to Mireille Delmas-Marty, is an inherent characteristic of law, since '[l]aw does not like multiplicity; it represents order, unified through hierarchy and symbolized by Kelsen's pyramid of norms, built for eternity – not by clouds, even if they are organized'.⁵⁰

In domestic legal systems, the unity of the legal order is generally considered a consequence of the law's systemic character.⁵¹ Yet, strong notions of systemic unity are difficult to transpose to the international plane. Is international law systemic because of its emerging normative hierarchies?⁵² Is it by virtue of a (more and more) complete set of

⁴⁸ P.-M. Dupuy, '*L'unité de l'ordre juridique international*', 297 *RdC* (2002) 1.

⁴⁹ Similarly, K. Zemanek, 'The Legal Foundations of the International System', 266 *RdC* (1997) 62: 'The "unity" of international law in the sense of its homogeneity is therefore a construct.' Cf. also the discussion in Section 2D of this article.

⁵⁰ M. Delmas-Marty, *Global Law: A Triple Challenge* (2003), at 74. For better readability, we have chosen to quote the English translation. Yet, the connotations of the original text are somewhat different: '*[L]e droit a l'horreur du multiple. Sa vocation c'est l'ordre unifié et hiérarchisé, unifié parce que hiérarchisé. Et l'image qui vient à l'esprit des juristes, c'est la pyramide des normes, construite pour l'éternité, plutôt que celle des nuages, fussent-ils ordonnées.*' M. Delmas-Marty, *Trois défis pour un droit mondial* (1998), at 104.

⁵¹ For a general discussion of positivist approaches to the notion of a legal system, cf. J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd ed., 1980).

⁵² Delmas-Marty, *supra* note 50.

secondary rules?⁵³ Is the ‘glue’ of overriding global values expressed in the law the decisive factor?⁵⁴ Is the systemic character of international law dependent on its efficacy?⁵⁵ We find it difficult to confidently respond in the affirmative to any of these questions. Neither formal hierarchies nor a normative ‘overlapping consensus’ of values nor centralized enforcement mechanisms appear to be sufficiently developed to guarantee legal unity.

While legal reasoning necessarily involves operationalizing hierarchical categories,⁵⁶ such hierarchies in international law rarely take the shape of relationships of inferiority and superiority between particular norms – relationships that could be called formal hierarchies. As Jean Combacau noted,

*Rien de tel en droit international, où le principe de l'égalité souveraine des Etats exclut toute forme de différenciation hiérarchique des normes puisqu'elles reposent toutes en dernier ressort sur un acte de volonté, au moins supposée, d'Etats pairs entre eux (c'est l'égalité) et ne connaissant pas de supérieur commun (c'est la souveraineté).*⁵⁷

In light of the emergence of the concept of *jus cogens*, Combacau's insistence on the equal status of all international norms may already have looked somewhat dated in 1986, when *Archives de philosophie du droit* published a special edition on the notion of the *système*. Certainly today, as *jus cogens* has emerged into a relatively uncontroversial concept (rumour has it that even France may soon give its blessing to *jus cogens* by acceding to the Vienna Convention⁵⁸), a certain degree of hierarchization of international norms cannot be denied. As Andreas Paulus has convincingly argued, however, ‘the indeterminacy of the content and the precise legal effect of *jus cogens* has largely condemned it to practical irrelevance’.⁵⁹ The *Al-Adsani* judgment by the European Court of Human Rights⁶⁰ (decided on the relevant point by nine votes to eight) is a case in point: while the *jus cogens* character of the prohibition against torture is, in principle, uncontroversial, it is not at all clear under which conditions a state is barred from pleading immunity; and under which conditions domestic courts must consequently entertain civil claims by torture victims to meet states' obligations under Article 6 of the European Convention. Hence, what remains open is precisely

⁵³ According to H. L. A. Hart, the existence of such secondary rules, ‘rules of recognition’ and ‘rules of change and adjudication’, is a necessary precondition for the existence of a legal system. H. L. A. Hart, *Concept of Law* (1961), at 113. While reference to Hart's seminal book is common, one should nonetheless keep in mind that international legal scholarship has adopted a somewhat different definition of secondary rules.

⁵⁴ Paulus, ‘Commentary to Andreas Fischer-Lescano & Gunther Teubner: The Legitimacy of International Law and the Role of the State’, 25 *Mich J Int'l L* (2004) 1047, at 1050.

⁵⁵ H. Kelsen, *The Pure Theory of Law* (1970), at 33 and 320: ‘a coercive order’.

⁵⁶ Cf. Koskeniemi, *supra* note 22. Delmas-Marty, *supra* note 50.

⁵⁷ Combacau, ‘Le droit international: bric-à-brac ou système?’, 31 *Archives de philosophie du droit* (1986) 85, at 88. ‘This is not the case in *international law*, in which the principle of the sovereign equality of States excludes all forms of hierarchical differentiation of norms, as they are all ultimately founded upon an act of will, at least supposed, of States that are all on a par with each other (equality) and that recognize no common superior (sovereignty).’

⁵⁸ Cf. Paulus, ‘*Jus cogens* Between Hegemony and Fragmentation: An Attempt at a Re-appraisal’, 74 *Nordic J Int'l L* (2005) 297, at 298.

⁵⁹ *Ibid.*, at 330.

⁶⁰ *Al-Adsani v. UK*, Application No. 35763/97 [2001] ECHR 761 (21 November 2001).

the question of how a *jus cogens* rule affects the international legal order in general. The emergence of *jus cogens* can thus hardly be regarded as the key factor that would turn the 'bric-à-brac'⁶¹ of international law into a systemic whole. Depicting *jus cogens* as a fundamental, quasi-constitutional canon of values, to which all other international law would refer back, means asking for a promise that the concept cannot (yet) hold. In Paulus' words, *jus cogens* 'substitutes rather than complements a truly public, quasi-constitutional order in international affairs'.⁶²

This brings us to another, related point: If formal hierarchies in international law are too weak to constitute or secure the systemic cohesiveness of international law, can universal values do the job? For a German-speaking lawyer, the classical treatise on the idea of unity of the legal order is Engisch's *Einheit der Rechtsordnung*, an influential monograph on legal theory published in the 1930s. With remarkable, almost troubling enthusiasm for the 'legal science', Engisch highlights the central role that the notion of a unitary legal order plays:

Dogmatics is the unity of the legal order! Indeed: If there is one thing that may give the science of the law the impetus to rise above a mere non-'dogmatic' grasping and interpreting of certain individual provisions of the law, as laymen are equally capable of doing, if there is anything that may be able to secure legal dogmatics the rank of a veritable science – we may even say more demanding: the rank of the science of value judgments par excellence, it is the overriding significance of the principle of the unity of the legal order . . .⁶³

At the same time, Engisch admits that the empirical reality of the legal order may look somewhat less unitary than its intellectual construction by jurists: 'One may even go as far as to say that the unity of the legal order is nothing but a regulative idea or the product of particular juridical methods',⁶⁴ Engisch notes. The question remains as to whether we can construe this 'product of particular juridical methods' on the international terrain. According to a theory developed by Claus-Wilhelm Canaris:

the attempt to conceptualize the system of a particular legal order as a formal one or as an axiomatic-deductive one is doomed to failure from the very beginning. For the inner unity of meaning of the law, which is supposed to be grasped in the system, is – in accordance with its derivation from the notion of justice – not of a logical kind but rather of a value-driven, i.e. axiological kind.⁶⁵

⁶¹ J. Combacau, note 57.

⁶² A. Paulus, note 58, at 331.

⁶³ K. Engisch, note 19, at 1: '*Die Dogmatik ist die Einheit der Rechtsordnung! In der Tat: Wenn irgend etwas der dogmatischen Wissenschaft vom Recht Antrieb zur Erhebung über bloßes nicht' dogmatisches' auch dem Laien mögliches Aufgreifen und Deuten einzelner Rechtsvorschriften zu geben vermag, wenn irgend etwas der Rechtsdogmatik den von ihr begehrten Rang einer echten Wissenschaft – wir dürfen sogar noch anspruchsvoller sagen: den Rang der Wertungswissenschaft par excellence – zu sichern geeignet ist, so ist es die beherrschende Bedeutung des Prinzips der Einheit der Rechtsordnung...*'

⁶⁴ *Ibid.*, at 3. '*Man mag sogar davon sprechen, dass die Einheit der Rechtsordnung nichts weiter als eine regulative Idee oder das Produkt ganz bestimmter juristischer Methoden sei.*'

⁶⁵ C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz* (1969), at 21: '*In der Tat ist der Versuch, das System einer bestimmten Rechtsordnung als formal-logisches oder axiomatisch-deduktives zu konzipieren, von vornherein zum Scheitern verurteilt. Denn die innere Sinneinheit des Rechts, die es im System zu erfassen gilt, ist entsprechend ihrer Ableitung aus dem Gerechtigkeitsgedanken nicht logischer, sondern wertungsmäßiger, also axiologischer Art.*'

The notion of justice according to Canaris notably includes ‘the requirement of the inner consistency of value judgments, which follows from the principle of equality’.⁶⁶

Proceeding from the assumption of a ‘value-driven unity’, the central question for Canaris is of course which values – in the sense of *Wertungen* rather than *Werte*, perhaps more aptly translated by ‘value judgments’ – constitute the inner unity of the legal order. In Canaris’ words, the ‘essential question remains to be answered: the question of the constituting elements in which the inner unity and consistency of the legal order becomes visible’.⁶⁷ Canaris aptly points out that one cannot reduce this question to mere conflict resolution – *Konfliktentscheidung*. Rather, the jurist must penetrate to the fundamental value judgments, the overarching *ratio juris* of a given legal order.⁶⁸ It is with these fundamental value judgments in mind that a lawyer must approach a concrete legal problem. Hence, to quote another theorist of the 1930s, Philipp Heck, ‘while [the judge] must decide the individual case before him, he does so by applying the entire legal order’.⁶⁹

It is precisely at this point that the international lawyer tends to lose her footing. First of all, it is doubtful whether a theory that is based on the constitutional principle of equality can work on the international level where such a general principle is absent. A second problem concerns Canaris’ recourse to the ‘fundamental value judgments’ of the legal order. To be sure, there are undeniable trends towards a ‘constitutionalization’ of international law, denoting the development of a vertically integrated, institutionalized, community-oriented and value-laden global order.⁷⁰ However, despite the emergence of certain global values,⁷¹ a fundamental structural difference remains between the domestic context and the international plane: besides global values, international law continues to build upon the sovereignty of states as a major constitutional principle.⁷² And at the heart of this sovereignty-based international order, even today, a multiplicity of values and political convictions compete for universal recognition. What about the role of *jus cogens*? Can the concept at least serve (if not as a tool of formal hierarchization) as a kind of systemic value glue for the international legal order? The canon of *jus cogens* rules can certainly be said to embody ‘fundamental value judgments’ (as posited by Canaris). For the time being, however, *jus cogens* rules are few and their contents opaque. To most concrete day-to-day questions of legal fragmentation, *jus cogens* simply provides no guidance. As a

⁶⁶ *Ibid.*, at 16: ‘... deshalb bildet das aus dem Gleichheitssatz folgende Gebot wertungsmäßiger Folgerichtigkeit den ersten entscheidenden Ansatz für die Verwendung des Systemgedankens in der Jurisprudenz ...’

⁶⁷ *Ibid.*, at 46: ‘ist indessen [...] die] wesentliche Frage noch nicht beantwortet: die nach den tragenden Elementen, in denen die innere Einheit und Folgerichtigkeit der Rechtsordnung sichtbar wird.’

⁶⁸ *Ibid.*

⁶⁹ P. Heck, *Begriffsbildung und Interessenjurisprudenz* (1932), at 107.

⁷⁰ Cf. Simma, ‘Fragmentation in a Positive Light’, 25 *Mich JIL* (2004) 845.

⁷¹ On this cf. Bederman, ‘Globalism and International Law: Values and Choices’, *Halle Institute Occasional Paper* (2001).

⁷² On the undiminished significance of the notion of sovereignty, even and particularly in a globalizing world, cf. Nolte, ‘Sovereignty as Responsibility’, 99 *ASIL Proceedings* (2005) 389; Nolte, ‘Zum Wandel des Souveränitätsbegriffs’, *Frankfurter Allgemeine Zeitung*, 6 Apr. 2004, at 8; Kingsbury, ‘Sovereignty and Inequality’, 9 *EJIL* (1998) 599.

consequence, the international lawyer is sometimes bound to accept systemic inconsistencies or incongruence⁷³ between various norms of international law. Sometimes she simply cannot go beyond what Canaris terms *Konfliktentscheidung*.

Rather than analogizing strong conceptions of legal systems developed in a domestic context, international jurists must settle for a more minimal conception. The idea of system is a central element of legal discourse – perhaps part of what David Kennedy has called the ‘styles’ of legal argument.⁷⁴ International law certainly possesses the basic characteristics to partake in a specifically legal discourse, in the sense that ‘the various decisions, rules and principles of which the law consists are not randomly related to each other’.⁷⁵ Leading contemporary scholars in international law, from Christian Dominicé⁷⁶ to Jean Combacau,⁷⁷ from James Crawford⁷⁸ to Karl Zemanek⁷⁹ and Gerhard Hafner,⁸⁰ have thus affirmed the systemic character of international law on a rather pragmatic tone.

Yet, can we justifiably call this minimal system, resembling in many respects a *bric-à-brac* rather than an organized whole, a legal order, an *ordre juridique* in which all

⁷³ Canaris differentiates between *Systembrüche* (frictions in the system) and *systemfremde Normen* (norms alien to the system), *supra* note 65, at 112 and 131.

⁷⁴ Similarly, MacCormick, ‘Beyond the Sovereign State’, 56 *Modern LR* (1993) 1, at 10. For Kennedy’s characterization of elements of styles of legal argument, see Kennedy, ‘Theses about International Law Discourse’, 23 *GYIL* (1980) 354.

⁷⁵ Koskenniemi, *supra* note 8, at para. 27. See the similar definition of a system in a weak sense in M. van Hoëcke, *Law as Communication* (2002), at 109–110: ‘System in the weak sense only requires some structure, some relationship among the elements of the system, which makes it possible to identify it as something that exists on its own and can be distinguished from a number of unordered elements and from other systems.’ (emphasis in original).

⁷⁶ According to Dominicé, international law is a system, because actors (states as well as non-state actors) behave accordingly: ‘This conclusion is buttressed by the finding that there is a sort of collective *opinio juris*, a conviction that international law exists and that states could not do without it. There is no need to seek a theoretical foundation to justify this assertion, which results from a mere observation of reality and is expressed by the maxim *ubi societas ibi ius*.’ Dominicé, ‘Methodology of International Law’, in R. Bernhardt et al., *Encyclopedia of Public International Law*, Vol. III (1997).

⁷⁷ Combacau’s answer is equally grounded on the empirical reality of international law: ‘Tout se passe comme si les Etats admettaient que ce qui, structurellement, se présente comme une norme, c’est-à-dire ce qui peut se formuler verbalement en termes de devoir-être, était en effet obligatoire, par application d’une exigence – je ne dis pas ‘d’une norme’ – supérieure à celle qu’énonce la norme en question.’ Combacau, *supra* note 57, at 90. ‘Everything happens as if States assume that that which, structurally, presents itself as a norm (that is, capable of verbal formulation in terms of an ought) is in effect obligatory, through the application of a requirement – I won’t say “of a norm” – superior to that which the norm in question expresses.’

⁷⁸ James Crawford has examined what makes international law an open system. While he proves his case as far as the *openness* of international law is concerned, its *systemic* character is more assumed than explained. According to Crawford, it suffices to regard ‘international law in the modern period as providing a formal structure, based on sovereignty, negotiation and consensus, on which we are building in a variety of ways.’ J. Crawford, *International Law as an Open System* (2002) 17, at 28.

⁷⁹ Zemanek, *supra* note 49, at 61–65.

⁸⁰ Hafner notes that international law lacks comprehensive organization. Such shortcomings, however, do not preclude that international law can at least be described as an ‘unorganized system’. Hafner, ‘Risks Ensuing from the Fragmentation of International Law’, in International Law Commission, *Report on the Work of its Fifty-third Session, Annex, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 10 (A/55/10)* 321.

norms are related to each other in a deliberate and meaningful way? Anthony Carty has sceptically noted that ‘there is no legal system which defines *comprehensively* the rights and duties of States towards one another’.⁸¹ And he has added elsewhere:

My own post-modern approach to the sources of international standards of behaviour does not merely leave open the possibility that there is no overarching system whose signification could be unravelled by a sufficiently subtle and tactful hermeneutic. It insists that such is the primary problematic with which international lawyers have to work. The LAW is a tapestry of lacunae with occasional densities of normativity.⁸²

While international law certainly is systemic, it does not necessarily constitute a comprehensive and organized legal order. Rather, the structure of the international system still strongly builds on informal hierarchies. Perhaps the most important among these informal hierarchies (though not strictly speaking a relationship of higher and lower rank) is the concept of general international law, in which all ‘special’ law is embedded.⁸³ It is only when the role of general international law as a cornerstone of the international legal system is appreciated that the significance of the *lex specialis* principle becomes apparent. The maxim validly gives effect to an informal hierarchy inherent in the organization of international law. Special regimes of international law can be conceptually related to general international law, including the regime of state responsibility, by invocation of the maxim *lex specialis derogat legi generali*: the rules on state responsibility, as codified by the ILC, are part of ‘general’ international law; they can be derogated from by all other secondary norms, which are by definition ‘special’.

Yet, as a practical matter, the application of the *lex specialis* maxim meets with difficulties. How far does the specialness of the special treaty extend? To what extent did the state parties intend to exclude the application of the rules on state responsibility? Formally, the answer can be found in two simple steps. First, the rules of the special regime, ordinarily codified in a treaty instrument, must be interpreted according to Article 31 of the Vienna Convention on the Law of Treaties in order to establish

⁸¹ A. Carty, *The Decay of International Law?* (1986), at 1 (emphasis added).

⁸² Carty, ‘Critical International Law: Recent Trends in the Theory of International Law’, 2 *EJIL* (1991) 1, at 25.

⁸³ There is surprisingly little in-depth discussion as to how the notion of general international law came about. For a classical discussion of the concept, cf. P. Reuter, ‘Principes de droit international public’, 103 *RdC* (1961) 469. Reuter rightly distinguishes between two functions of the notion of ‘généralité’: on the one hand, the ‘fonction du nombre abstrait d’Etats liés par une norme’, on the other hand, ‘le degré d’abstraction d’une norme’ (ibid.). ‘A function of the abstract number of States bound by a norm’... ‘the degree of abstraction of a norm’ Typically, textbook discussions of the concept of general international law fail to take account of the multiple aspects of generality. Reuter concludes that ‘pour la mise en ordre des normes internationales la généralité ne donne que des indications diverses qui doivent être composées avec d’autres considérations.’ Ibid. ‘the notion of generality only provides us with differing indications as to how international norms should be ordered, which must be combined with other considerations.’ It is hardly disputed that the rules on state responsibility form part of the body of rules denoted as general international law. Since these rules can be very specific in content, their ‘generality’ appears to be a function of their universal application and their fundamental character, to take up Reuter’s distinction.

whether the states parties intended the regime's secondary rules to be exhaustive and complete. Second, resort must be had to general international law to verify whether the latter permits such derogation.⁸⁴

Practically speaking, however, reference to treaty interpretation is hardly satisfactory. None of the treaty regimes presented as candidates for self-contained regimes contains an explicit provision regarding the applicability *vel non* of the rules of state responsibility. For example, the Treaty establishing the European Communities is silent as to whether general international law is excluded when no procedures before the European Court of Justice are available. The WTO's Dispute Settlement Understanding (DSU) contains provisions similar to the rules on cessation of breach and on countermeasures in the ILC's regime on state responsibility. The DSU fails to state, however, whether the regime on state responsibility should apply for all remaining questions. Human rights treaties spell out particular enforcement mechanisms (in particular, reporting procedures and individual complaint procedures). Yet, the treaties leave open the question whether such mechanisms affect states' rights to invoke state responsibility according to general international law.

Textual arguments in favour of either the open or closed nature of the three regimes just mentioned are as numerous as they are inconclusive. To cope with this problem, universalists operate with a presumption in favour of the applicability of the 'general' state responsibility regime; a presumption that can be refuted only by contracting out of general international law with sufficient clarity. With regard to the local remedies rule, an all-time classic of general international law, the International Court of Justice pointed out in the *ELSI* case:

The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.⁸⁵

Similarly, Special Rapporteur James Crawford spoke of a 'presumption against the creation of wholly self-contained regimes in the field of reparation'.⁸⁶ According to such a presumption, the rules on state responsibility apply unless the treaty clearly provides otherwise. In Joost Pauwelyn's words, to quote another 'universalist', '[i]t is for the party claiming that a treaty has "contracted out" of general international law to prove it'.⁸⁷

⁸⁴ Special Rapporteur Arangio-Ruiz had maintained that no derogation was allowed 'from those essential rules and principles on the consequences of internationally wrongful acts that are inherent to international relations and international law' (Arangio-Ruiz, *supra* note 11, at 40, para. 112.). However, state practice does not unequivocally indicate the recognition of a *jus cogens* character of the rules on state responsibility. In most cases, the International Court's statement in *North Sea Continental Shelf* appears to also hold true with regard to secondary norms of general international law: '[I]t is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases or as between particular parties.' (*North Sea Continental Shelf* cases, ICJ Reports (1969), at 42 para. 72).

⁸⁵ *Elettronica Sicula (ELSI)*, ICJ Reports (1989), at 42, para. 50.

⁸⁶ J. Crawford, Third Report on State Responsibility, UN Doc. A/CN.4/507 (2000) para. 147.

⁸⁷ Pauwelyn, *supra* note 8, at 213.

2 Self-contained Regimes in a Fragmented Legal Order

Thus far the story of fragmentation has been based on the assumption of a unified legal order. However, such an approach had both friends and foes in the International Law Commission. In stark contrast to what turned out to be the majority view, Riphagen suggested that international law should be seen as the aggregate of different regimes, co-existing without any pre-defined hierarchy:

A theoretical answer might be that a system was an ordered set of conduct rules, procedural rules and status provisions, which formed a *closed legal circuit* for a particular field of factual relationships. A subsystem, then, was the same as a system, but not closed in as much as it had an interrelationship with other subsystems.⁸⁸

Focusing on the variety of regimes involved in international law (rather than on the international legal system), Riphagen advocated a ‘particularistic’ vision of the international legal order. More recently, the International Criminal Tribunal for the Former Yugoslavia (ICTY), in its *Tadic* judgment, expressed a similar conception of international law when it held that, ‘[i]n International Law, every tribunal is a self-contained system (unless otherwise provided)’.⁸⁹

Riphagen’s theory draws on Stephen Krasner’s classical definition in international relations theory of a ‘regime’ as ‘a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations’.⁹⁰ While the modern interest in ‘regimes’⁹¹ is probably inspired by the work of theorists such as Krasner, the idea of a polycentric international law can be traced back (at least) to Georges Scelle. If we allow Antonio Cassese to lend his succinct words to Scelle, ‘[t]he world community swarms with myriad legal orders (in today’s parlance we would call them “sub-systems”)’.⁹²

It is only a small step from Scelle’s socio-legal analysis to contemporary sociological accounts of international law. Andreas Fischer-Lescano and Gunther Teubner have fruitfully deployed a version of Luhmann’s *Systemtheorie* to shed light on the fragmentation of international law.⁹³ According to these two authors, the debate on the fragmentation of international law suffers from two reductionisms: if fragmentation is equated with a problem of collision of norms, we are faced with a legal reductionism. If, by contrast, the focus is on the political foundations of norm collision, a political reductionism is inevitable.⁹⁴ Claiming to avoid the limitations

⁸⁸ *ILC Yearbook*, Vol. I (1982), at 202, para. 16.

⁸⁹ 35 *ILM* (1996), at 32, para. 11.

⁹⁰ Krasner, *supra* note 37.

⁹¹ Cf. for example, Winham, ‘International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO’, 2 *WTR* (2003) 131.

⁹² Cassese, ‘Remarks on Scelle’s Theory of ‘Role Splitting’ (dédoulement fonctionnel) in International Law’, 2 *EJIL* (1990) 210. Cf. G. Scelle, *Manuel de droit international public* (1948) 19–21.

⁹³ Teubner and Fischer-Lescano, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 *Mich J Int’l L* (2004) 999. The authors’ analysis touches on numerous interesting issues. In the following, however, we will limit our summary of the article to what appears to be of particular relevance for our case study on self-contained regimes.

⁹⁴ *Ibid.*, at 1003.

inherent in conventional approaches, Fischer-Lescano and Teubner describe the proliferation of international legal regimes as the epi-phenomenon of the multidimensional fragmentation of world society⁹⁵ – a global space which has differentiated itself into myriad autonomous systems. ‘Legal fragmentation is merely an ephemeral reflection of a more fundamental, multi-dimensional fragmentation of global society itself.’⁹⁶

The sticking point of their analysis is the observation that all law, whatever its conventional label (domestic or international, private or public), is closely coupled with a sectoral system dedicated to maximizing a particular rationality. Within the legal system, geographical borders have been replaced by functional, systemic delimitations: ‘the national differentiation of law is now overlain by structural

⁹⁵ *Ibid.*, at 1017.

⁹⁶ *Ibid.*, at 1004. This proposition, while plausible at first glance, is not beyond contestation. The somewhat radical title chosen by the authors for their article in the *Michigan Journal*, ‘The Vain Search for Legal Unity’, risks misguiding the reader. For the authors do concede that ‘[u]nity of the legal system has been achieved at global level’ (*ibid.*, at 1008). In reality, they do not dispute the notion of some kind of ‘legal unity’, but rather the possibility of a quasi-constitutional global law, integrating in an orderly manner the most diverse values and rationalities. It is the ‘multitude of internal contradictions’ (*ibid.*) within unity that the authors highlight in their piece. A fundamental point of critique of Fischer-Lescano and Teubner’s approach concerns their apparent equation of *differentiation of issue regimes* with the *fragmentation of international law*. Despite the complexity of the authors’ theoretical framework, their analysis does not pay due account to another important systemic distinction drawn by systems theory: the distinction between the legal system and its environment (constituted by other systems such as politics, religion or economics). It is precisely systems theorists who have emphasized that the legal system achieves a particular inner cohesiveness by virtue of its binary operations, which autopoietically refer back to the system’s previous operations. Hence, it does not suffice, for example, to point out that a ‘rationality conflict’ between trade concerns and biosafety can be described as a collision of the issue systems of commerce and health (each of which comes with a particular institutional and legal arrangement). At the same time, the legal system (comprising lawyers within *both* institutions for trade facilitation *and* health protection) remains operatively closed *vis-à-vis* its political and economic environment. In an attempt to maximize its own rationality, the legal system attempts to resolve conflicts within its own operation, at the expense of, say, the political system. Trade lawyers and health lawyers simultaneously act as elements of two systems: as part of the legal system (which is eager to distinguish itself from its non-law environment); and as part of the subject-matter systems ‘trade’ or ‘health’ (which aim at maximizing their respective rationality at the expense of other rationalities prevalent in the environment). In our view, the *crux* of the fragmentation of international law lies precisely in this inner tension, the ‘role strain’ that international lawyers are exposed to. Mark Van Hoecke, who himself strongly draws on systems theory, consequently arrives at a different conclusion: The more radically a society’s *issue systems* diversify, the stronger are in turn the forces towards autonomy of and unity within the *legal system*. According to Van Hoecke, ‘[a] stronger ‘juridification’ of our societies has led to an increased autonomy of law, but at the price of an increased interdependence of legal systems.’ (M. Van Hoecke, ‘Legal Orders Between Autonomy and Intertwinement’, in K.-H. Ladeur (ed.), *Public Governance in the Age of Globalization* (2004) 177, at 193. Cf. also *ibid.* at 186: ‘Here, one could also state that the decrease of autonomy *vis-à-vis* other legal systems increases the autonomy towards the non-legal systems.’ Given the increase in ‘intersystemic interdependence of legal systems’ (*ibid.*, at 194), a stronger role of legal doctrine is called for, which achieves a ‘rational structuring of all those data into one coherent whole.’ (*Id.*) In short: ‘Increasing fragmentation of law is thus coupled with an enhanced intertwining of the different areas of law.’ (*Id.* at 187). Cf. for other points of critique – in particular concerning a lack of legitimacy of decentralized law-making by non-state actors – Paulus, *supra* note 54.

fragmentation'.⁹⁷ If all international law necessarily follows the logic of a particular issue area,⁹⁸ it comes as no surprise that the establishment of 'genuinely self-contained regimes'⁹⁹ appears conceivable. Fischer-Lescano and Teubner explain:

Since such [self-contained] regimes are structurally coupled with the independent logic of the social sectors, they inevitably reproduce, albeit in a different form, the structural conflicts existing between the various functional systems within the law.¹⁰⁰

Many such genuinely self-contained regimes, namely those that have a strong institutional structure,¹⁰¹ evolve into auto-constitutional regimes.¹⁰² In line with the logic of Luhmann's *Systemtheorie*, such regimes remain, in principle, autonomous. At best, a selective networking of various regimes can be achieved.¹⁰³ As a result, 'a strange legal esperanto of regimes' will emerge, 'within which national, international and trans-national legal acts clamor for attention'.¹⁰⁴

If we look at the various approaches discussed in this section under the heading of 'particularistic approaches', the following common baseline can be established: even proponents of a particularistic theory concede that regimes 'do not live by themselves, each in its own area, but intersect and overlap with each other'.¹⁰⁵ To borrow the language of Luhmann's *Systemtheorie*, every system is linked with its environment through 'structural coupling'.¹⁰⁶ Yet, shifting attention from the systemic whole to the system's particular components, from the universe to the planets, does not remain without consequence. Not surprisingly, life on the planet becomes more interesting than the fate of the universe. The particularistic approach entails emphasizing a regime's political purposes (rather than the politics of the international community); the tailor-made character of a regime's legal rules (rather than the claim to universal justice of general international law); and the legal culture corresponding to the politics of the system (rather than the longstanding expertise of international law generalists).

⁹⁷ *Ibid.*, at 1008. For a balanced discussion of the move from 'territoriality' to 'functionality', cf. Paulus, 'From Territoriality to Functionality? Towards a Legal Methodology of Globalization', in I. F. Dekker and W. G. Werner (eds), *Governance and International Legal Theory* (2004) 59.

⁹⁸ For this term, cf. Alvarez and Leebron, 'Linkages', 96 *AJIL* (2002) 5, at 6.

⁹⁹ *Ibid.*, at 1013. It should be noted, however, that Fischer-Lescano and Teubner adopt a rather broad and somewhat vague definition of self-contained regimes (borrowed from Koskenniemi, *supra* note 8, Addendum para. 105).

¹⁰⁰ Fischer-Lescano and Teubner, *supra* note 93, at 1013.

¹⁰¹ The authors refer to other factors, quoting a definition proposed by Walker, 'The EU and the WTO: Constitutionalism in a New Key', in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001) 31, at 33.

¹⁰² Fischer-Lescano and Teubner, *supra* note 93, at 1015. Such regimes are characterized by the fact that they establish a structural coupling between their primary and secondary rule-making with the creation of substantive social norms in a specific societal sector, *ibid.*, at 1016.

¹⁰³ *Ibid.*, at 1018 *et seq.* For a similar conclusion, cf. K.-H. Ladeur, *Postmoderne Rechtstheorie: Selbstreferenz – Selbstorganisation – Prozeduralisierung* (1992) 159 *et seq.* (particularly at 161).

¹⁰⁴ Fischer-Lescano and Teubner, *supra* note 93, at 1022.

¹⁰⁵ *Ibid.*

¹⁰⁶ Luhmann, *supra* note 31, at 776 and 779.

Hence, there is a certain scepticism towards any attempt to 'smuggle' alien elements into the regime. Making use of norms outside the regime is more of an 'emergency operation' than a desirable practice. Tribunals established under particular regimes thus tend to apply a presumption in favour of complete and exhaustive regulation in the respective regime.¹⁰⁷ Most notably, such a presumption underlies the rulings of the European Court of Justice. Since the Community Treaty has 'created its own legal system',¹⁰⁸ lacunae are filled by analogies within the system or by recourse to general principles inherent in the Community legal order instead of falling back on general international law. The *Francovich* principles may be cited as one example where resolving shortcomings of a regime are resolved within its own operations and in accordance with its own logic.¹⁰⁹

As a consequence of a presumption in favour of completeness, the threshold for resorting to rules outside the regime is much higher. Applied to our case study on the relationship between special regimes and general international law, any resort to the rules on state responsibility requires special justification. State responsibility is not a general fall-back option, which *automatically* fills the gaps of the regime. Rather, the framework on state responsibility is an *aliud* only to apply in *exceptional* cases. Once a presumption in favour of a regime's completeness is accepted, tribunals established under the regime may easily conclude (in accordance with the maxim *expressio unius est exclusio alterius*) that resort may not be made to remedies other than those specified. Hence, from the particularistic perspective, regimes are likely to appear as self-contained.

D Of Planets and the Universe: The Level-of-Analysis Problem

Who then is right, the universalists or the particularists? Treaty interpretation in accordance with the Vienna Convention apparently fails to produce a definite resolution of the problem. It seems that the wording of the special treaties (WTO, EC, human rights . . .) can simply be read both ways: as permitting or precluding application of the rules on state responsibility. In such a situation, lawyers have attempted to avoid indeterminacy by recourse to presumptions. A presumption in favour of general international law is widely shared among public international lawyers. The contrary presumption prevails among Community lawyers and many WTO specialists. Both presumptions reflect a certain perspective on the international legal order (universalistic v. particularistic view).

Both presumptions are difficult to solidly ground in theory. As Sandifer observes, '[b]y its very nature the law of presumptions belongs primarily to the realm of municipal law, rather than to international law. It is dependent upon a superior authority with power to define the presumptions and the inferences to be drawn from them. . . .'¹¹⁰

¹⁰⁷ Cf. in the context of WTO law, McRae, 'The WTO in International Law: Tradition Continued or New Frontier?', *JIEL* (2000) 27. Similarly, Dunoff, 'The WTO in Transition: Of Constituents, Competence and Coherence', 33 *Geo Wash Int'l L Rev* (2001) 979, at 1009.

¹⁰⁸ *Costa v. ENEL*, 6/64, [1964] ECR, 585 at 593.

¹⁰⁹ *Francovich and Bonifaci v. Italy*, joined cases C-6/90 and C-9/90, [1991] ECR, I-5357.

¹¹⁰ D. V. Sandifer, *Evidence Before International Tribunals* (1975), at 141 *et seq.*

The international legal system, largely dependent on ‘horizontal’ processes of law-making, lacks such authority. Absent a reliable presumption in favour of the universal or the particular, the universe or the planet, the analysis appears to be left in a limbo – between unity and particularity – without any clear indication of which way to tilt the balance.

We have juxtaposed two approaches to self-contained regimes that proceed from fundamentally different premises, a universalistic one and a particularistic one. The former takes the ‘whole’ of the legal order as a starting point. The latter proceeds from a detailed examination of one of its particular subsystems, followed by a discussion as to how the particular fits into the wider body of law and institutions. Depending on whether we choose a universalistic or a particularistic perspective, whether we first see the universe or the planets, the analysis tends to yield different results. If we focus on the universe, the law of the universe (general international law) governs the planets. If we focus on the planets, planetary rules (the rules of the subsystem) leave little room for universal law. As the ILC’s Special Rapporteur Arangio-Ruiz has observed with regard to the EC:

Generally, the specialists in Community law tended to consider that the system constituted a self-contained regime, whereas scholars of public international law showed a tendency to argue that the treaties establishing the Community did not really differ from other treaties . . .¹¹¹

The disparity of the conclusions of ‘specialists in community law’ and ‘scholars of public international law’ is a consequence of what has been called the level-of-analysis problem. In international relations theory, Singer warned that analytical results of one and the same political issue varied depending on whether an analysis was carried out at the level of the international system or at the level of the national state.¹¹² By analogy, Singer’s observations are relevant to the present level-of-analysis problem. ‘Universalist’ public international lawyers perceive special regimes as integral parts of a larger international system, while their ‘particularist’ colleagues view the international system through the prisms provided by a particular regime. The ‘system-oriented model’ (i.e., the universal approach) tends to lead the observer into a position that exaggerates the impact of the system upon the particular regimes and, conversely, discounts the impact of the regimes on the system.¹¹³ The regime model, on the other hand, avoids an inaccurate homogenization that may flow from the systemic focus. However, it may also lead to the opposite type of distortion – a marked exaggeration of the differences among sub-systemic actors and a certain blindness to their common systemic construction.¹¹⁴

¹¹¹ G. Arangio-Ruiz, ‘Summary Records of the Meetings of the Forty-fourth Session’, *ILC Yearbook* Vol. I (1992) 76.

¹¹² Singer, ‘The Level-of-Analysis Problem in International Relations’, in K. Knorr and S. Verba, *The International System: Theoretical Essays* (1960) 77. Singer’s article constitutes the classical articulation of the level-of-analysis problem. Contemporary international relations theory routinely analyses international relations at various theoretical levels.

¹¹³ *Ibid.*, at 80.

¹¹⁴ *Ibid.*, at 83.

3 The Fallback on General International Law

A ‘... & il paroît qu'on l'a voulu plus fortement’

The debate on self-contained regimes is a case in point for the relative character of maxims of treaty interpretation. Two valid techniques of interpretation yield diametrically opposed results: if we assume that states have to ‘contract out’ of general international law, the rules on state responsibility apply to the extent that there is no express derogation. If we emphasize the particular character of special systems, the maxim *expressio unius est exclusio alterius* permits the conclusion that no other rules than those specified apply. Yet, we do not purport to suggest that the question whether a fallback on the rules on state responsibility is conceivable is fatally indeterminate. The preceding section has demonstrated, however, that a formal, almost mechanical application of the *lex specialis* principle, based on a presumption in favour of the ‘general’ provision, does not suffice to establish the applicability of the rules on state responsibility. The *lex specialis* maxim is merely an argumentative tool to articulate further, normative considerations.

In special systems, the general international law on state responsibility may be relevant in various ways, including problems of attribution,¹¹⁵ circumstances precluding wrongfulness,¹¹⁶ or the irrelevance of internal law.¹¹⁷ The hard case, however, remains the question whether recourse to countermeasures in the event of a continuous violation of a treaty obligation should be permitted. Can states fall back on general international law, after they have exhausted the special rules and procedures of a special regime? Countermeasures under general international law provide an enforcement mechanism that special systems may lack. Thus, the policy question is whether primary rules contained in special subsystems ‘deserve’ the additional ‘bite’ that enforcement through countermeasures can deliver.

In other words, are there reasons why obligations in special regimes should be considered ‘softer’ than other international law? If de Vattel is right, the contrary is the case: ‘il est ordonné plus précisément, & il paroît qu'on l'a voulu plus fortement’.¹¹⁸ The fact that states decide to go through the cumbersome process of multilateral treaty-making suggests that the rules elaborated in this process are of particular importance. It goes without saying that, hypothetically, states are free to negotiate special norms of international law precisely with a view to softening their obligations. However, we should not presume lightly that states would be less willing to live up to special obligations than to duties under general international law. Absent a clear indication, special rules must be deemed to embody a particular commitment.

¹¹⁵ Articles 4–11 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 9.

¹¹⁶ Articles 20–27 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, *ibid.*

¹¹⁷ Article 32 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, *ibid.*

¹¹⁸ de Vattel, *supra* note 13. ‘it is enjoined with greater precision, and appears to have been more pointedly intended’.

B Effective Treaty Interpretation and the ‘Fallback’ on General International Law

One need not go as far as Kelsen, who stated that international law is true law only if it is a ‘coercive order’,¹¹⁹ that is, if reprisals are available,¹²⁰ to justify a fallback on the general international law of state responsibility.¹²¹ A fallback on the general international law of state responsibility as a measure of last resort follows from the principle of effective treaty interpretation. The line of reasoning operates in three steps:

- (1) If states create new law – whether it be in the field of human rights, trade or regional cooperation – there is a presumption that such rules embody a particularly strong commitment.
- (2) General international law vests a state with certain capacities to ensure that its rights be respected, including a restricted right to unilateral enforcement action (countermeasures).
- (3) Among several possible constructions, the principle of effective interpretation¹²² requires adopting the interpretation that best gives effect to the norm in question. Effectiveness includes the notion of enforceability. Consequently, it cannot be easily inferred that a state was willing to give up ‘the rights or *facultés* of unilateral reaction it possessed under general international law’¹²³ by complementing special primary obligations with a specific set of secondary obligations. If states create new substantive obligations along with special enforcement

¹¹⁹ Kelsen, *supra* note 55, at 320: ‘international law is “law”, if it is a coercive order, that is to say, a set of norms regulating human behaviour by attaching certain coercive acts (sanctions) as consequences to certain facts, as delicts, determined by this order as conditions, and if, therefore, it can be described in sentences which – in contradistinction to legal *norms* – may be called “rules of law”.’

¹²⁰ *Ibid.* at 321: ‘It is easy to demonstrate that this assumption is correct with respect to reprisals. For it is a principle of general international law that a state which considers some of its interests violated by another state, is authorized to resort to reprisals against the state responsible for the violation. A “reprisal” is an interference – under normal circumstances forbidden by international law – in the sphere of interest of a state; it is an interference that takes place without and against the will of the state concerned and is in this sense a coercive act, even if it is executed without physical force (i.e., without force of arms) when the affected state does not resist.’

¹²¹ In fact, we would tend to side with Rosalyn Higgins, who stated that the existence of effective sanctions does not predicate the existence of a norm of international law. R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 16. This is particularly true in light of contemporary compliance theories, which have suggested that coercion is merely one out of several factors that encourages compliance with international obligations, cf. Pulkowski, ‘Testing Compliance Theories: Towards the United States Obedience of International Law in the *Avena* Case’, 19 *Leiden J Int’l L* (2006), issue 2.

¹²² Despite its frequent use, the systematic foundation and the actual content of the principle of effective interpretation have remained somewhat opaque. Taking the Vienna Convention on the Law of Treaties as a starting point, the effectiveness principle (or the maxim *ut res magis valeat quam pereat*) is reflected either in the duty to interpret ‘in the light of [a treaty’s] object and purpose’ or in the notion of good faith. The notion of good faith may be the more convincing solution: the principle of effective interpretation precludes a state from frustrating the obligations assumed by invoking a formal circumvention of the conditions under which the norm would apply. Cf. I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed. 1984), at 115 *et seq.*; R. Jennings and A. Watts, *Oppenheim’s International Law* (9th ed. 1992), at 1280 *et seq.*

¹²³ Arangio-Ruiz, *supra* note 111, at 77.

mechanisms, they merely relinquish their *facultés* under general international law in favour of a special regime's procedures to the extent that and as long as those procedures prove efficacious. When such procedures fail, enforcement through countermeasures under general international law becomes an option.

C Scenarios for a Fallback on State Responsibility

Under this premise, a fallback on state responsibility – and particularly on the regime of countermeasures – is conceivable in three scenarios:¹²⁴ in the case of continuous violation of an obligation under a special system, despite a decision to the contrary by the system's competent dispute settlement body; in the case of an injured state's failure to obtain reparation, despite a respective decision by the system's competent dispute settlement body; if unilateral action is necessary as a defensive measure.

Recourse to countermeasures under international law, critics contend, may jeopardize the integrity of the particular regime in question. Such critics close their eyes to an important truth: while the unilateral enforcement of obligations undoubtedly constitutes an 'emergency operation', countermeasures contribute to creating future expectations of effective enforcement in the international community. As Michael Reisman has noted, 'the expectation of the effectiveness of enforcement mechanisms is a factor inducing compliance. Enforcement becomes a "self-fulfilling prophecy"'.¹²⁵ Once countermeasures have contributed to the peaceful resolution of one of the above 'emergency scenarios', 'expectations of effectiveness are generated, permitting enforcement machinery subsequently to fulfil its function by symbolic presence rather than by active intervention'.¹²⁶ Countermeasures may thus ultimately preserve (rather than jeopardize) the integrity of a special regime's enforcement mechanism.

In the application of countermeasures, due respect must obviously be paid to the characteristics of the special regime in question. It would be wrong, however, to assume from the outset that the delicate structures of environmental law or human rights could not be adequately treated by the general international law practitioner with her state responsibility toolbox. The Articles take account of sensitivities of special regimes in various ways:

- (1) The differentiation between injured states and non-injured states entitled to a limited range of remedies prevents states whose interests are not affected from meddling into other states' affairs.
- (2) The test of proportionality allows accommodation of the needs of special fields of international law and the interest of states in the integrity of an institutional system.

¹²⁴ Cf. Simma, *supra* note 6, at 111; Arangio-Ruiz, *supra* note 11, at para. 115.

¹²⁵ Reisman, 'The Enforcement of International Judgments', 63 *AJIL* (1969) 1, at 7 (footnote omitted).

¹²⁶ *Ibid.*

- (3) Except where no other response can be envisaged, no remedy may be resorted to that would impair the continued performance of the obligation breached. This refers above all to countermeasures. Thus, the spectre of state responsibility loses some of its alarm once a closer look is had at how the Draft Articles operate in practice.

D A Broader Picture: Negotiating the Balance of Effectiveness and Legitimacy

Hence, we suggest that, in principle, the particular rules of a special system govern the consequences of breaches of substantive obligations. If the need arises, however, the invocation of the ‘rules of the universe’ (the general international law on state responsibility) remains a valid lawyerly technique to enhance the effectiveness, the *effet utile* of the rules of the planet (the substantive obligations contained in the respective subsystem). The *lex specialis* principle is the methodological tool in the hand of the jurist to connect a particular regime with general international law in this case.

Such ‘oscillation’ between the invocation of unity and particularity is a legitimate and commonly employed technique of legal argument. In strong regimes, general international law may serve as a source of legitimacy, while the rules of the regime provide the kind of operational effectiveness that advances the goals of the regime. In weak regimes, the rules of the regime often embody a superior legitimacy. In this case, lawyers reach out for the law of the universe of general international law to increase the effectiveness of the regime’s rules.

Let us illustrate this point with two examples. The WTO is generally perceived as a ‘strong’ regime. However, its effectiveness is impeded by its – partial – incompleteness. The regime does not contain any specific rules on interpretation, standard of review, burden of proof: in short, rules that assist panellists in administering the substantive law. In these areas, the WTO regime cannot but refer to rules and principles developed under general international law. The Appellate Body confirmed the openness of the regime when it held ‘that the *General Agreement* is not to be read in clinical isolation from public international law’.¹²⁷ It may be safely concluded that both the parties and the judicial organs of the WTO do not hesitate to invoke the ‘unity’ of international law, when rules outside the regime appear to enhance its effective operation.¹²⁸

At the level of substantive obligations, WTO dispute settlement presents a different picture. Every non-trade concern is suspected of giving rise to potential protectionism

¹²⁷ US – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 17. Cf. generally, Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’, 95 *AJIL* (2001) 535.

¹²⁸ As R. Howse has pointed out, reference to the general international law on treaty interpretation may, in addition, be seen as enhancing the legitimacy of the WTO: ‘[T]he very decision to follow these general interpretative rules of public international law enhances the legitimacy of the dispute settlement organs in adjudicating competing values, because these norms are common to international law generally, including to regimes that give priority to different values, and are not specific to a regime that has traditionally privileged a single value, that of free trade.’, Howse, ‘From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime’, 96 *AJIL* (2002) 94, at 110.

impeding the regime's effectiveness. Hence, panels (and to a lesser extent the Appellate Body) tend to stress the particularity of WTO law, refraining from unnecessarily cross-linking WTO provisions with other rules of the 'universe'. However, this isolationist discursive strategy can only be pursued as far as the point where the effectiveness-legitimacy balance begins to tilt. Once the legitimacy of the decision comes under fire, the invocation of 'unity' rather than 'particularity' becomes an interesting discursive option. By relying on rules outside the WTO regime that, in the view of many, embody legitimate concerns or internationally recognized ethical positions, the WTO's judicial bodies have attempted to import the legitimacy offered by the 'universe' to the 'planet'.

In the *US–Shrimp* case,¹²⁹ the Appellate Body referred to international environmental instruments outside the WTO to counter the image of the WTO as a cold-hearted trade-over-everything institution. Adopting such a unitary discourse did not even require the Appellate Body to reverse the recommendation of the panel in substance. While the Appellate Body reproved the panel for its 'particularistic', trade-focused approach,¹³⁰ it nonetheless concluded that the US 'fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994'.¹³¹ The submissions by the US, Canada and the European Communities in the recent *EC-GMO* case reflect a similar discursive pattern: while the complainants (US, Canada) suggested an isolationist reading of the relevant WTO provisions,¹³² the EC made a unitary argument, asking the panel to increase the decision's legitimacy by recourse to non-WTO rules and standards.¹³³

Similar discursive patterns can be observed in institutionally weaker regimes, such as human rights. In good times, human rights lawyers tend to stress the particularity of their regime. Human rights obligations follow a different logic from reciprocal, universal international law; they constitute 'objective regimes'.¹³⁴ As the European Court of Human Rights stated in the *Northern Ireland* case, human rights treaties are '[u]nlike international treaties of the classical kind' since they go beyond reciprocal obligations.¹³⁵

¹²⁹ *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, WT/DS58/AB/R.

¹³⁰ The panel briefly discussed the various international instruments presented by the US. However, it was not convinced that such instruments would distract from the parties' substantive WTO obligations. The Appellate Body, by contrast, deferred to rules and standards outside the WTO regime to some extent, interpreting the terms of WTO provisions in accordance with such rules and standards.

¹³¹ *Ibid.*, para. 187.

¹³² The US' first submission is available at http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Index_-_Pending.html.

¹³³ The EC's first submission is available at <http://trade-info.cec.eu.int/wtodispute/search.cfm?code=2>.

¹³⁴ Riphagen, 'Fourth Report', in *ILC Yearbook*, Vol. II, Part One, (1983), at 17, para. 89.

¹³⁵ *Ireland vs. UK*, ECtHR, Ser. A Vol. 25, para. 239. Cf. similarly the statement by the European Commission of Human Rights in the *Pfunders* case: 'It clearly appears from these pronouncements that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law.' 4 *Yearbook of the European Convention of Human Rights* (1961) 116, at 138.

By contrast, when the effectiveness of human rights regimes faces a severe challenge, lawyers are inclined to stress the unity of international law, arguing that human rights are merely part of the larger international legal order. Such unity is a precondition for enforcing human rights by the use of countermeasures under general international law. For example, in response to the 1998 humanitarian crisis in Kosovo, the European Communities adopted legislation that required the freezing of Yugoslav funds and an immediate flight ban.¹³⁶ And when, in 1981, the Polish government suppressed demonstrations and interned dissidents, several Western countries responded by suspending treaties providing for landing rights.¹³⁷

4 Case Studies on Self-contained Regimes

The latter examples take us right back to the problem of special rules in the field of state responsibility: the human rights regime falls back on general international law when its effectiveness is jeopardized. After having established in the foregoing sections that the existence of self-contained regimes is doubtful conceptually, it is time to take a closer look at some ‘candidates’ for such self-contained regimes. Four regimes that are often referred to as quasi-autonomous systems merit closer consideration: diplomatic law, the European Communities legal system, WTO law and human rights. All four regimes contain special rules governing the consequences of breach of a primary obligation. To take account of the special characteristics of the respective regime, the consequences of breach must, in principle, be deemed to flow from the regime’s special treaty provisions – at the exclusion of the general international law on state responsibility. Yet, once these rules prove inefficient, a unitary counter-argument remains feasible and the rules on state responsibility apply. None of the regimes in question can be considered as fully self-contained.

A Diplomatic Privileges

The rules of international law most commonly associated with the notion of self-containment, the rules of diplomatic law, are at the same time the least convincing example of a closed system of secondary rules. In what may well be referred to as a jurisprudential overkill (or, to put it mildly, an unnecessarily broad statement), the International Court of Justice in its *Tehran Hostages* judgment ruled that diplomatic law ‘specifies the means at the disposal of the receiving State to counter any such abuse’¹³⁸ of diplomatic privileges and that, therefore, diplomatic law constitutes a self-contained regime. It cannot be contested, of course, that the possibility of declaring a diplomat *persona non grata* is a special remedy of diplomatic law, recourse to which will usually be the appropriate reaction to an abuse of diplomatic privileges. However, the Court’s dictum goes too far:

¹³⁶ Common positions of 7 May and 29 June 1998, OJ 1998, L 143 and L 190; implemented through EC Regulations 1295/98 (L 178, 33) and 1901/98 (L 248, 1).

¹³⁷ Rousseau, ‘Chroniques des faits internationaux’ – Subsection on ‘Mesures adoptées par les Etats occidentaux à l’égard de la Pologne’, 86 RGDIP (1982) 605.

¹³⁸ *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980) 40.

- (1) The Court was only concerned with the question whether a receiving state is entitled to resort to countermeasures as a reaction to a breach of the Vienna Convention. However, if one perceives diplomatic law as a closed system, recourse to the rules of state responsibility would equally be excluded for the sending state. This is neither logical from a systematic point of view nor is it necessary for the safeguarding of diplomatic relations. There is no reason why the sending state should be precluded from initiating countermeasures (not affecting diplomatic personnel) if the receiving state fails to respect the immunities of the sending state's diplomatic personnel.¹³⁹ For instance, international law did not preclude the US in the situation of *Tehran Hostages* from resorting to countermeasures outside the Vienna Convention, including the suspension of a treaty of amity, in order to induce Iran to free US personnel.
- (2) Even assuming an abuse of diplomatic privileges similar to the conduct of which Iran accused the US diplomats in *Tehran Hostages*, there may be a need to resort to remedies under general international law. The Vienna Convention does not contain a provision on reparation. If a diplomat, however, by abusing his privileges inflicts economic damage on the receiving state, there is no reason why the receiving state should be precluded from recovering that damage, in addition to declaring the perpetrator *persona non grata*. In *Tehran Hostages*, the Court itself affirmed Iran's duty to make reparation to the US.
- (3) Diplomatic law has always been the classic playground of reciprocity. At least at the time when the Vienna Convention was drafted, the ILC appears to have been of the view that the symmetry of its obligations would allow reciprocal reprisals.¹⁴⁰ Given the traditional acceptance of countermeasures as a 'fact of life', it is to be strongly doubted whether diplomatic law has since evolved into a non-reciprocal regime justifying the categorical exclusion of all forms of unilateral reaction.¹⁴¹ Paul Reuter's comment in the ILC plenary of 1984 still merits consideration:

¹³⁹ Concurring: Zemanek, 'The Unilateral Enforcement of International Obligations', 47 *ZaöRV* (1987) 40: 'The Court wanted to protect diplomats from reprisals, not their sending States.'

¹⁴⁰ Cf. the Commentary to the ILC Draft Article 44 of 1958 (now Article 47 of the Vienna Convention), *ILC Yearbook*, Vol. II (1958), 105, which presupposes the existence of reprisals in diplomatic law: 'It is assumed that the restrictive application in the sending State concerned is in keeping with the strict terms of the rule in question, and within the limits allowed by the rule. Otherwise there is an infringement of the rule and the action of the receiving State becomes an act of reprisal.'

¹⁴¹ The ILC's 2001 Commentaries on State Responsibility appear to envision a more far-reaching protection of diplomatic immunities. '[M]easures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents.... On the other hand, the scope of prohibited countermeasures under article 50 (2) (b) is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict.' ILC, *supra* note 11, at 339. Even Barnhoorn, otherwise a supporter of the self-containment theory, admits that 'the exact determination of the scope of the [inviolability] rule has always given problems.... [I]t is not entirely clear what immunities are precisely covered.' Barnhoorn, 'Diplomatic Law and Unilateral Remedies', XXV *Netherlands Yearbook IL* (1994) 39, at 80.

He was of the view that, in so far as more general obligations such as humanitarian obligations were not involved, the injured State could respond in kind to a manifest violation of the rules on privileges and immunities. For instance, in the event of the violation of the unanimously accepted rule concerning the diplomatic bag, the injured State should be entitled to act in the same way as the State responsible for the violation. In such circumstances, the regime of privileges and immunities did not seem to be particularly self-contained.¹⁴²

- (4) Finally, resort to countermeasures may be necessary under the fallback scenarios outlined above – if the sending state fails to withdraw a diplomat who was declared *persona non grata*; and, as an immediate defensive measure, if the receiving state catches the diplomat *in flagrante delicto*. By the same token, the ILC had stated in the commentary to its draft convention on diplomatic relations¹⁴³ that diplomatic inviolability ‘does not exclude . . . either measures of self-defence or, in exceptional circumstances, measures to prevent [a diplomat] from committing crimes or offences’.¹⁴⁴

Given the ‘permeability’ of diplomatic law, in fact its dependence on the remedies of the general rules of state responsibility, there is no ground for arguing that diplomatic law contains an exhaustive set of secondary rules. Rather, the exemption of diplomatic immunity from the scope of lawful ‘targets’ of countermeasures is a limitation within the general law of state responsibility, which follows from the purposes for which the diplomatic immunities are granted. Diplomatic channels may be useful, even, and *a fortiori*, in times of crisis.¹⁴⁵ Moreover, diplomatic relations would be severely impeded if diplomatic personnel were to potentially ‘constitute resident hostages’.¹⁴⁶ Thus, the definition of certain limitations to unilateral reprisals is all that the *Tehran Hostages* ruling was about in substance. It is unfortunate that the Court’s unnecessarily broad dictum is suggestive of a closed-circuit system of legal consequences. In Dominicé’s words, ‘pour affirmer qu’une violation initiale du droit diplomatique ne peut en aucune manière autoriser l’Etat qui en est la victime à le transgresser à son tour, l’argument du régime se suffisant à lui-même n’est pas nécessaire’.¹⁴⁷

The ILC’s Articles on State Responsibility confirm by implication that the theory that the exemption of diplomatic immunity from countermeasures is merely a question of the proper application of the general rules of state responsibility. The Commission’s earlier debate mirrors the confusion caused by the Court’s *Tehran Hostages* pronouncement. Special Rapporteur Riphagen, speaking, more in passing, of a ‘self-contained regime of diplomatic law’,¹⁴⁸ seemed to be inclined to construe diplomatic

¹⁴² Reuter, Summary Records of the Meetings of the Thirty-sixth Session, *ILC Yearbook*, Vol. I (1984), at 264.

¹⁴³ Which formed the negotiating basis of the Vienna Convention on Diplomatic Relations.

¹⁴⁴ *ILC Yearbook*, Vol. II (1958), at 97.

¹⁴⁵ Barnhoorn, *supra* note 141, at 63.

¹⁴⁶ ILC, *supra* note 9, at 240.

¹⁴⁷ Dominicé, ‘Représailles et droit diplomatique’, in *Recht als Prozeß und Gefüge. Festschrift für Hans Huber zum 80. Geburtstag* (1981) 551. ‘It is not necessary to have recourse to the notion of a self-contained regime in order to affirm that an initial violation of diplomatic law cannot in any way authorize the wronged State to transgress that law in turn.’

¹⁴⁸ *ILC Yearbook*, Vol. II, Part I (1983), at 18, para. 97.

law as a closed circuit containing its own conclusive secondary rules.¹⁴⁹ Special Rapporteur Arangio-Ruiz then questioned whether limitations on the use of countermeasures really flow from any self-contained nature of diplomatic law. Instead, he suggested that such limitations were a consequence of the application of the general rules and principles constituting the regime of countermeasures.¹⁵⁰ Consequently, he introduced a provision in the regime of countermeasures that specifically prohibits measures affecting diplomatic inviolability.¹⁵¹

The commentary adopted in 1995, however, does not fully reflect Arangio-Ruiz's criticism. In the commentary, the ILC suggests that the prohibition of reprisals is either derived from the self-containment of diplomatic law or from an alleged peremptory character of some of its essential norms.¹⁵² Special Rapporteur Crawford and, following him, the Commission discarded the latter hypothesis.¹⁵³ Article 50 in the ILC's final product now makes an explicit distinction between *jus cogens* (paragraph 1) and other obligations whose performance may be particularly useful in times of conflict – diplomatic immunities and contractual dispute settlement obligations (paragraph 2). While such an exemption of diplomatic immunity from countermeasures 'on functional grounds'¹⁵⁴ was generally endorsed, the Commission avoided grounding it in any self-contained character of diplomatic law.

Systematically, the most convincing solution is to perceive the limitations to countermeasures in Article 50(2) of the ILC text simply as an expression of the proportionality principle laid down in its Article 51.¹⁵⁵ Countermeasures affecting diplomatic inviolability or the suspension of dispute settlement obligations are, in principle, deemed disproportionate. If Article 50(2) is understood as a presumption of disproportionality, however, this presumption can be refuted in an individual case if a state demonstrates that overriding interests are at stake. The International Court of Justice has had occasion to confirm that insistence on dispute settlement duties may be

¹⁴⁹ Riphagen's report, however, offers an unfortunate example of a misleading use of terminology, using 'self-contained regimes' as a synonym for any subsystem, cf. *supra* fn 88 and accompanying text.

¹⁵⁰ *ILC Yearbook*, Vol. II, Part 1(1992), at 39, para. 110.

¹⁵¹ Article 14 as proposed in 1995, International Law Commission, *Report on the Work of its Forty-seventh Session, Official Records of the General Assembly*, Fiftieth Session, Supplement No. 10 (A/50/10) 149.

¹⁵² International Law Commission, Draft Commentaries to Articles 13 and 14 of Part Two of the Draft Articles, A/CN.4/L.521, with further references.

¹⁵³ International Law Commission, *supra* note 26, at 339: 'The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.'

¹⁵⁴ *Ibid.*, at 341.

¹⁵⁵ There is some indication that the ILC considered the admissibility of targeting diplomatic personnel by countermeasures to be a question of proportionality because the Commission notes that, after the remedies provided under the Vienna Convention have been exhausted without success, '[a]t a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met.' *Ibid.*, at 339. We go only one step further in the sense that even the inviolability of diplomatic personnel should not be sacrosanct provided that sufficiently grave state interests are at stake.

‘wholly artificial’ and ‘excessively formalistic’;¹⁵⁶ in short, disproportionate in individual cases. Similarly, in the cases sketched out above, insistence on the inviolability of diplomatic personnel may be a disproportional limitation to a state’s right to unilateral reaction. The threshold for infringing the physical freedom of diplomats, however, would obviously have to be very high.

B The European Communities Legal System

While diplomatic law is a rather unlikely candidate for self-containment (if it were not for an unfortunate dictum of the Hague Court), the legal system set up by the ‘Treaty establishing the European Community’ bears very strong characteristics of self-containment. The point of view of the European Court of Justice is as well known as it is unequivocal: the Community Treaty has ‘created its own legal system’,¹⁵⁷ which ‘constitutes a new legal order of international law’.¹⁵⁸ Therefore, ‘the basic concept of the Treaty requires that member States shall not fail to carry out their obligations and shall not take the law into their own hands’,¹⁵⁹ irrespective of considerations of reciprocity. ‘A member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another member State to comply with the rules laid down by the Treaty’.¹⁶⁰ The continuous assertion of the Community’s *sui generis* character, however, does not by itself create an ‘own legal order’. From a public international law perspective, the EC legal system remains a subsystem of international law.¹⁶¹ Since any amendment of the constituting treaties still depends on the consent of the Union’s sovereign member states, ‘the Community legal order is still dominated by the spirit of international law’.¹⁶²

From a purely systematic point of view, the rules on state responsibility are, hence, residually applicable.¹⁶³ But is there still a need for such residual application? We have posited that states only intend to relinquish their *facultés* under general international law in favour of a special regime’s procedures to the extent that and as long as a subsystem’s procedures prove efficacious. Consequently, a fallback on the general rules of state responsibility presupposes that the mechanisms under the EC Treaty fail

¹⁵⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports (1986), para. 274.

¹⁵⁷ *Costa v. ENEL*, 6/64, ECR [1964], 585 at 593.

¹⁵⁸ *Van Gend en Loos*, 26/62, ECR [1963], 1 at 12.

¹⁵⁹ *Commission v. Luxemburg and Belgium*, joint cases 90/63 and 91/63, ECR [1964], 625.

¹⁶⁰ *Mutton and Lamb*, 232/78, ECR [1979], 2729.

¹⁶¹ Cf. Pellet, ‘Les fondements juridiques internationaux du droit communautaire’, V *Collected Courses of the Academy of European Law* (1994) 249; A. Marschik, *Subsysteme im Völkerrecht* (1997) 210; Conway, ‘Breaches of EC Law and the International Responsibility of Member States’, 13 *EJIL* (2002) 679; Hartley, ‘International Law and the Law of the European Union – A Reassessment’, 72 *BYbIL* (2001) 1.

¹⁶² De Witte, ‘Rules of Change in International Law: How Special is the European Community?’, XXV *Netherlands Yearbook IL* (1994) 299, at 331.

¹⁶³ Cf. also the analysis by Hartley, *supra* note 161, who concludes that the EC has not constituted its separate legal system by virtue of some kind of constitutional metamorphosis subsequent to the EC’s foundation in the realm of international law.

to give effect to the obligations members have assumed under the Treaty. The reparation regime under the EC Treaty is comprehensive and mostly effective. As Gerard Conway has correctly pointed out,¹⁶⁴ most of the gaps still existing 20 years ago¹⁶⁵ have now been filled up. The *Francovich*¹⁶⁶ and *Brasserie du Pêcheur*¹⁶⁷ principles have vested individuals with a remedy to recover damages resulting from breaches of EC law by Member States; Article 228 EC Treaty has been introduced to give the declaratory judgments of the Court rendered according to Articles 226 and 227 the 'bite' of a pecuniary sanction, if a member state disregards them; and Article 7 of the EU Treaty provides for an institutionalized procedure for the suspension of membership in case of a grave and continuous violation of Community law.

As far as we can see, only two hypothetical scenarios can be identified in which lacunae in Community law may prompt a fallback on state responsibility.

- (1) The first scenario would involve a continuous violation of Community law by an EC Member State. Obviously, the *lex specialis* principle would require another Member State (respectively the Commission) to exhaust the more 'special' mechanisms under the EC Treaty. A starting point would be for an affected state to bring the matter before the Commission and, if the Commission does not take up the case itself, to the European Court of Justice pursuant to Article 227 of the EC Treaty. If the violating state chooses not to change its conduct despite a judgment of the Court, the Commission has the authority to seize the Court once more with an application for a pecuniary penalty pursuant to Article 228(2) of the Treaty.¹⁶⁸ If the violation persists, the Member State may attempt to have the membership of the violating state suspended pursuant to Article 7 EU Treaty. The latter remedy, which operates on the political rather than the legal plane, will not prove to be successful, however, unless the 'injured' state can obtain a declaration of a grave and continuous breach by unanimous vote of the Council. Arguably, in this extreme scenario, the only option to induce compliance that remains for the 'injured' state is a fallback on unilateral countermeasures.
- (2) The second scenario revolves around the issue of state-to-state reparation for breaches of EC law. Claims for compensation of damages suffered by nationals, that is, cases of diplomatic protection, do not fall under this category; following *Brasserie du Pêcheur* and *Francovich*, individuals are vested with a cause of action of their own. Cases where economic losses may be incurred by a Member State's domestic economy as such, rather than by certain individuals, may resemble the so-called *guerre de moutons*. In this instance, the United Kingdom indicated that

¹⁶⁴ Conway, 'Breaches of EC Law and the International Responsibility of Member States', 13 *EJIL* (2002) 679, at 688.

¹⁶⁵ Cf. Simma, *supra* note 6, at 126 et seq.

¹⁶⁶ *Francovich and Bonifaci v. Italy*, joined cases C-6/90 and C-9/90, ECR [1991], I-5357.

¹⁶⁷ *Brasserie du Pêcheur v. Germany and Factortame v. UK*, joined cases C-46/93 and C-48/93, ECR [1996], I-1029.

¹⁶⁸ If the Commission fails to do so, the 'injured' state could consider action against the Commission pursuant to Article 232.

the damage caused by French non-compliance with a Court judgment resulted in economic losses of £20 million.¹⁶⁹

Yet, the EC Treaty makes no explicit provision for a mechanism that would allow inter-state claims of reparation. The literature has proposed several dogmatic bridges to cover up this lacuna and accommodate inter-state claims for reparation within the EC system. The first is to resort to an extensive interpretation of Articles 227 and 228 of the EC Treaty, according to which a declaration of breach by the European Court entails the duty 'to re-establish the status quo ante (*restitutio in integrum*) and, where necessary, pay compensation for any injury suffered'.¹⁷⁰ Some authors, however, doubt that the Commission's involvement under Article 228 is suitable for reparation cases and consequently suggest grounding claims for compensation directly on Article 220, which emphasizes the Court's role as a guardian of the law.¹⁷¹ A third dogmatic foundation of inter-state claims would be an application *mutatis mutandis* of the *Francovich* principles.¹⁷² Recourse to the rules on state responsibility will not be necessary if the European Court of Justice accepts one of these dogmatic bridges to accommodate inter-state claims for damages within the European legal system. Nonetheless, a fallback on countermeasures would still be conceivable to *enforce* a Member State's claim of reparation. Member States may well have to resort to the 'mechanisms of state responsibility . . . as traditionally understood',¹⁷³ if the mechanisms within the EC do not prove effective.

Thus, systematically, a fallback on countermeasures remains conceivable, albeit only in two narrow 'emergency' scenarios. Some authors claim, however, that the specific teleology of the Community order precludes such unilateral action. One argument points to the exclusive jurisdiction of the European Court of Justice in adjudicating disputes on Community law (Article 292 EC Treaty). Yet, the fallback scenarios envisaged take due account of the Court's central role, since unilateral action is reserved for cases of non-compliance with the Court's decision.¹⁷⁴

A more weighty argument relates to the alleged lack of reciprocity in legal relations among the Member States. The European Court has asserted that the new legal order created by the EC Treaty leaves no room for reciprocity considerations. Reciprocity, however, is not something states can choose to 'abolish'; it is an inherent structural

¹⁶⁹ Cf. Schwarze, 'Das allgemeine Völkerrecht in den innergemeinschaftlichen Beziehungen', 18 *Europarecht* (1983) 24. The UK government initially requested that the Commission order France to pay £20 million in damages. The request, however, was withdrawn for political reasons.

¹⁷⁰ A. G. Toth, *Legal Protection of Individuals in the European Communities*, Vol. II (1978), at 181; cf. for further references, A. Marschik, *Subsysteme im Völkerrecht* (1997) 231 *et seq.*

¹⁷¹ Tomuschat, 'Völkerrechtliche Schadensersatzansprüche vor dem EuGH', in J. F. Baur, P. Müller-Graff and M. Zuleeg (eds), *Europarecht – Energierecht – Wirtschaftsrecht: Festschrift für Bodo Börner zum 70. Geburtstag* (1992) 458.

¹⁷² Marschik, *supra* note 161, at 233, who points out that the Court in *Commissio v. Italy*, 39/72, ECR [1973], 112 explicitly mentioned that one Member State may be liable towards another Member State.

¹⁷³ J. H. H. Weiler, *The Constitution of Europe: The Transformation of Europe* (1999) 29.

¹⁷⁴ As Conway points out, Article 292 EC Treaty only excludes other judicial or institutional methods of dispute resolution; it is not concerned with the question of unilateral enforcement. Conway, *supra* note 161, at 686.

characteristic of obligations that operate on a *do ut des* basis. Many of the substantive provisions of the Treaty, such as the fundamental freedoms, are structurally reciprocal guarantees. Whether Member States have renounced their rights to enforce these guarantees by reciprocal measures is quite a different question. They certainly have done so to a great extent. But here we return to the basic proposition underlying the unitary argument: Member States only intended to relinquish their reciprocal *facultés* under general international law to the extent that the EC's special procedures proved effective. Consequently, the non-reciprocity argument does not preclude counter-measures in the two 'emergency' scenarios outlined above, in which the procedures inherent in the EC system fail.

Developing a third argument against unilateral action, Joseph Weiler has pointed to the adverse effects of reprisals on individuals. '[T]he recourse to counter-measures would inevitably affect individuals removed from the dispute, militating against the very notion of a "new legal order of international law . . . the subjects of which comprise not only Member States but also their nationals".'¹⁷⁵ It is true that countermeasures will usually impair certain individual benefits. Weiler seems to disregard, however, that this is equally true for the continuous violation of EC law that provokes unilateral reaction. A grave and enduring breach of Community law constitutes not only a measure of disrespect for the other Member States' rights but at the same time inevitably affects the benefits of 'individuals removed from the dispute' in those Member States.

To sum up: it is reasonable to conclude that EC law operates as a closed system of secondary rules for most practical purposes. Conceptually, however, it is not a self-contained regime since there remain scenarios in which a fallback on state responsibility remains feasible and necessary, and since such a fallback is not precluded by peculiar characteristics of the Community order.¹⁷⁶ Only after the European Union has attained such a degree of integration that recourse to general international law is not conceivable without putting into question the whole *raison d'être* of the treaty framework might the conclusion of self-containment be justified. But this, it is submitted, is not (yet) the state of European integration.

C The WTO System

In an article for the *Netherlands Yearbook of International Law*, Pieter Kuyper contrasted the GATT, 'which was a self-contained regime of international law only in aspiration but not in reality', with the (then) newly created WTO, which 'has moved decisively in the direction of such a self-contained regime'.¹⁷⁷ From a legal point of view, the WTO appears to be more independent of and 'closed' towards general international law than the GATT. At the same time, however, the WTO has increasingly 'opened' to a common culture of international lawyers. The conclusion only appears

¹⁷⁵ Weiler, *supra* note 173, at 29.

¹⁷⁶ Concurring: Conway, *supra* note 161, at 691 and Marschik, *supra* note 161, at 173, 259 *et seq.*

¹⁷⁷ Kuyper, 'The Law of GATT as a Special Field of International Law', XXV *Netherlands Yearbook IL* (1994) 227, at 252.

paradoxical at a first glance. In reality, as Weiler has put, it '[j]uridification is a package deal. It includes the Rule of Law but also Rule of Lawyers.'¹⁷⁸

In the GATT era, there was a clear need for unilateral enforcement, since a single contracting party, including the defeated respondent, was able to block the adoption of a panel report (or the establishment of a panel in the first place).¹⁷⁹ The Marrakesh Agreement with its Dispute Settlement Understanding (DSU) has eliminated this loophole by establishing a negative consensus procedure. Moreover, Article 23 DSU obliges members to submit (all of) their disputes to the WTO's dispute settlement machinery: 'When Members seek the redress of a violation . . . they shall have recourse to, and abide by, the rules and procedures of this Understanding'.

The ILC, in its commentaries on state responsibility, interprets this provision as an explicit derogation from the rules of state responsibility. 'In some cases it will be clear from the language of a treaty or other text that only the consequences specified are to flow. . . . An example . . . is the World Trade Organization Dispute Settlement Understanding as it relates to certain remedies.'¹⁸⁰ Other authors have affirmed the contrary, namely that '[n]othing in Article 23 . . . amounts to an express derogation'¹⁸¹ of the rules of state responsibility. It is true that the wording of Article 23 establishes the primacy of WTO dispute settlement. On the other hand, the wording neither specifically permits nor prohibits recourse to additional remedies under general international law beyond those provided by WTO law. However, are there remedies under state responsibility that WTO law would not contain in a more tailor-made form?

It is clear that the DSU contains a *lex specialis* on cessation of the breach and on continued performance of the obligation.¹⁸² Pursuant to Article 19.1 of the DSU, panels are empowered to order¹⁸³ a member to 'bring the measures into conformity' with WTO law. However, it is far from clear whether the WTO system contains remedies akin to reparation¹⁸⁴ and countermeasures.¹⁸⁵ Article 22 of the DSU addresses 'compensation' and the 'suspension of concessions' (also known as 'sanctions' or 'retaliation'). From a systematic point of view, however, both remedies can be regarded as a

¹⁷⁸ Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35 *JWT* (2001) 191, at 197.

¹⁷⁹ Before the creation of the WTO, there was severe disagreement between the US and the EC, however, on whether unilateral action was precluded. The EC took the view that the GATT was essentially a political arrangement rather than a legal one and that the positive consensus system was an integral part of the GATT. Cf. M. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (1995).

¹⁸⁰ ILC, *supra* note 11, at 357.

¹⁸¹ M. Garcia-Rubio, *Unilateral Measures as a Means of Enforcement of WTO Recommendations and Decisions* (2001). Cf. also Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', 11 *EJIL* (2000) 763.

¹⁸² Articles 29 and 30 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 9.

¹⁸³ 'Recommend' in the DSU's language. The recommendation formally assumes a binding character once it is adopted by the Dispute Settlement Body.

¹⁸⁴ Articles 31 *et seq.* of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 9.

¹⁸⁵ Articles 49 *et seq.* of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, *ibid.*

special variant of the *inadimplenti non est adimplendum* principle of the law of treaties.¹⁸⁶ In case of a breach, the general rules of the law of treaties permit the temporary suspension of a treaty to restore the symmetry of obligations. The compensation provision of Article 22.1 introduces an element of flexibility. It allows a state to temporarily uphold a violation in exchange for concessions in other areas, provided that the injured state agrees.¹⁸⁷ Similarly, suspension of concessions pursuant to Article 22.4 constitutes merely a partial non-performance of the treaty, subject to the prior authorization and the subsequent monitoring by the Dispute Settlement Body. Since 'compensation' and 'retaliation' restore the reciprocity balance within the *same* Agreement,¹⁸⁸ they systematically 'deal with the same substantive matter'¹⁸⁹ as Article 60 of the Vienna Convention;¹⁹⁰ being essentially 'remedies' under the law of treaties, they would not necessarily derogate as *leges speciales* the rules of state responsibility.

Systematic arguments aside, and seen from a functional perspective, sanctions pursuant to Article 22 DSU operate in a very similar way to countermeasures. As Pauwelyn has pointed out, concessions are suspended primarily with a view to inducing compliance. Once the principal objective is compliance (and not the restoration of contractual equity), however, the WTO sanctions 'have shifted into the area of State responsibility'.¹⁹¹ The *US – Foreign Sales Corporations* and *US – Steel* disputes between the EC and the US confirm the finding that states employ suspensions of concessions similarly to countermeasures under general international law. In the *Steel* case, the mere threat of sanctions worth more than \$2 billion¹⁹² persuaded the US administration to cut back domestic steel subsidies after the Appellate Body had confirmed their illegality.¹⁹³ Consequently, strong grounds exist for regarding the WTO rules on retaliation as *leges speciales vis-à-vis* countermeasures under general international law. Recourse to reprisals parallel to or in lieu of WTO-authorized sanctions is thus precluded. Similarly, the panel in *US – Section 301* concluded that 'WTO members [are prevented] from unilaterally resolving their disputes in respect of WTO rights and obligations'.¹⁹⁴

¹⁸⁶ Cf. Article 60 of the Vienna Convention on the Law of Treaties; Simma and Tams, 'Commentary on Article 60', in O. Corten and P. Klein (eds), *Commentaire article par article des Conventions de Vienne de 1969 et 1986 sur le droit des traités* (forthcoming).

¹⁸⁷ This agreement to compensation has thus been described as 'a temporary renegotiation of the WTO treaty', Pauwelyn, *supra* note 8, at 219.

¹⁸⁸ However, it could be argued that the option of cross-retaliation, which allows a member under certain conditions to suspend the performance of other covered Agreements, introduces an element of reprisals.

¹⁸⁹ Fitzmaurice, *supra* note 18, at 203.

¹⁹⁰ Cf. Sicilianos, 'The Relationship between Reprisals and Denunciation or Suspension of a Treaty', 4 *EJIL* (1993) 341; J. Crawford, *Second Report on State Responsibility*, A/CN.4/498 Add 2 (1999) paras 314–329. Crawford and Olleson, 'The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility', 21 *Australian Yearbook IL* (2000) 1.

¹⁹¹ Pauwelyn, *supra* note 8, at 230.

¹⁹² Cf. <http://www.eubusiness.com/afp/031124173342.qe9cs5uw>.

¹⁹³ *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, Report of the Appellate Body, 10 November 2003, WT/DS248/AB/R.

¹⁹⁴ *United States – Sections 301–310 of the Trade Act of 1974*, Report of the Panel, 22 December 1999, WT/DS152/R, 7.46.

Most contentious, however, is the question whether a fallback on reprisals under state responsibility remains an option once the suspension of concessions proves ineffective. The ILC commentaries are critical of such a fallback from the WTO type of countermeasures to the state-responsibility type. Having discussed WTO sanctions, the ILC adds that '[t]o the extent that derogation clauses . . . are properly interpreted as indicating that the treaty provisions are "intransgressible", they may entail the exclusion of countermeasures'.¹⁹⁵ Yet, that the DSU's clauses are to be 'properly interpreted' as indicating that their provisions are 'intransgressible', is a doubtful proposition. Of course, the procedures under the DSU take precedence. Article 22.7 of the DSU vests a body of arbitrators with the competence to determine the amount of sanctions to be authorized, thus depriving WTO members of the right to unilaterally determine the level of countermeasures. Once these procedures have been exhausted, however, countermeasures under general international law remain the *ultima ratio*, only to apply in cases of continuous non-compliance and provided that there is a prospect that unilateral action will effectively induce compliance.

To the large trading powers, such reprisals will hardly be an option. WTO-authorized trade sanctions will generally be the most effective means of instigating compliance. If trade sanctions worth \$4 billion annually cannot persuade the United States to amend its Foreign Sales Corporations subsidies legislation, it would be surprising if the suspension of a bilateral treaty could. By contrast, for smaller and developing countries, recourse to countermeasures outside the WTO system may be a necessary last resort. If a large trading nation fails to comply with a WTO ruling, the temporary non-performance of a non-WTO treaty may well strengthen the position of a smaller injured state. General international law may, thus, be a useful tool in the hand of a smaller or developing country to address what is generally perceived as a deplorable asymmetry in the WTO's enforcement process. As the arbitrators in the *Bananas* dispute noted with respect to Ecuador and the EC:

One may ask whether this objective [of encouraging compliance] may ever be achieved in a situation where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party which has failed to bring WTO-inconsistent measures into compliance with WTO law.¹⁹⁶

To give only a rough indication of the economic asymmetry involved, the volume of trade in goods of the EC, the potential target of Ecuadorian retaliation, exceeded Ecuador's trade volume by a factor of two hundred.

The question of monetary compensation remains. The WTO Agreements contain no functional equivalent of retrospective reparation. Can states, consequently, fall back on the rules of state responsibility and demand *restitutio in integrum* and monetary compensation, either in panel proceedings or outside the dispute settlement machinery? Member states have argued partly in favour of,

¹⁹⁵ ILC, *supra* note 9, at 357; cf. also *ibid.*, at 330. Critical also Pauwelyn, *supra* note 8, at 233.

¹⁹⁶ Para. 73.

partly against, an obligation to make reparation for injury.¹⁹⁷ Academic literature is similarly divided.¹⁹⁸ WTO panels have shown an inclination to recognize an obligation to grant *restitutio in integrum*, where restitution was feasible. This was particularly the case with respect to illegal subsidies¹⁹⁹ (which the beneficiary could pay back) and unlawfully imposed anti-dumping duties²⁰⁰ (which the collecting state could reimburse to the unjustly targeted company).

For the bulk of trade-restricting measures, however, restitution is not a feasible option.²⁰¹ Monetary compensation, by contrast, raises a number of problems. Which damages would states claim? Claiming losses of nationals would introduce an element of diplomatic protection, which may be alien to the 'objective' trade regime.²⁰² Moreover, total damages would easily amount to billions if the breach extends over several years. Had the negotiating states during the Uruguay round envisaged an obligation to make such retrospective compensation, they would have defined the terms of operation of such a massive reparation regime (calculation of damages, statutory limitation, etc.). Given the current state of WTO law, it seems reasonable to infer that the treaty-law mechanisms of Article 22 DSU are indeed exhaustive when it comes to monetary compensation.

With the introduction of 'suspensions of concessions' as a countermeasures equivalent, the WTO system has indeed 'moved decisively in the direction of . . . a self-contained regime'.²⁰³ The object and purpose of the DSU do not permit a state to have parallel recourse to claims for compensation or countermeasures under the general international law of state responsibility. As an *ultima ratio* in cases of continuous non-compliance, however, countermeasures outside the WTO framework remain an option. Thus, arguably, not even the WTO is completely decoupled from the secondary rules governing the consequences of breaches under general international law.²⁰⁴

¹⁹⁷ In favour or reparation, e.g., Ecuador, WT/DSB/M/89, para. 8. Against reparation Australia, the EC, the US and Canada, WT/DSB/M/75, 5 *et seq.*

¹⁹⁸ In favour: Mavroidis, *supra* note 181, at 765; Pauwelyn, *supra* note 8, at 226. Against: Crawford, *supra* note 87, at para. 420.

¹⁹⁹ *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, 21 January 2000, WT/DS126/RW, 6.48. Even in subsidies cases it is dubious whether *restitutio* is always a feasible option. In the *Foreign Sales Corporations* case, e.g., the US would potentially be under an obligation to demand thousands of recipients of FSC tax credits to pay unjustly credited taxes for a period of two decades. Such an obligation would almost certainly conflict with the prohibition of retroactive legislation of most states' constitutions.

²⁰⁰ *Guatemala – Cement II*, Panel Report, 17 November 2000, WT/DS156.

²⁰¹ Since it is 'materially impossible' or involves 'a burden out of all proportion to the benefit deriving from restitution instead of compensation', Article 35(b) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 9.

²⁰² Petersmann, 'GATT Dispute Settlement Proceedings in the Field of Anti-Dumping Law', 8 *CMR* (1991) 101; Marschik, 'Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System', 9 *EJIL* (1998) 212 at 226.

²⁰³ Kuyper, *supra* note 177, at 252.

²⁰⁴ Cf. also Marceau, 'WTO Dispute Settlement and Human Rights', 13 *EJIL* (2002) 753 at 766 *et seq.* Perez has suggested that countermeasures may, furthermore, be necessary if a state relies in an abusive manner on the 'self-judging security exception' of Article XXI GATT (Perez, 'WTO and U.N. Law: Institutional

D *Treaties for the Protection of Human Rights*

The internationalization of human rights has turned the state ‘inside out’. To the extent that the treatment of individuals has been elevated to the level of international law, an important area of state regulation has been carved out of the traditional *domaine réservé*. The trend towards internationalizing the protection of human rights has led to the adoption of various international conventions such as, at the regional level, the European and American Conventions on Human Rights (ECHR, ACHR) and the Banjul Charter; the two ‘global’ Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR); and sectoral human rights regimes such as the Convention on the Elimination of all Forms of Racial Discrimination (CERD).

All these treaties spell out particular enforcement mechanisms. However, given the centrality of human rights in 21st-century international relations, it is not surprising that the spirit of human rights has transcended these specific instruments, entering the formerly state-oriented area of ‘general’ international law. For instance, the rules on state responsibility codified in 2001 contain a specific regime on responsibility for breaches of obligations in the collective interest. The crucial question in the context of this paper is: To what extent do these rules on state responsibility apply to breaches of obligations under a human rights treaty?

The International Court’s *Nicaragua* judgment illustrates in an exemplary way the oscillation of legal argument between particularity and unity. On its face, the judgment appears to suggest that remedies under human rights treaties should be considered exclusive (acknowledgment of particularity).

[W]here human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves.²⁰⁵

However, a closer look qualifies the hasty conclusion of exclusiveness. Remedies under human rights treaties, according to the Court, are not exclusive *per se*. Rather, the Court found that the special treaty mechanisms excluded unilateral enforcement mechanisms under general international law because ‘the mechanisms provided for have functioned’.²⁰⁶ Bearing this qualifier in mind, the International Court of Justice

Comity in National Security’, 23 *Yale J Int’l L* (1998) 310, at 324). In our view, however, the security exception should be subject to limited panel review. Applying a good faith test, which would require that the measure taken must appear at least somewhat reasonable and understandable from an objective point of view, seems the most balanced and practical option. It takes account of states’ interests to avoid presenting a detailed case on what is a national security matter, while maintaining a certain level of transparency and accountability (cf. the overview in Pulkowski, ‘Coalition Procurement for Iraq in the Crosshairs of WTO Law’ 5 *German LJ* (2004) 257, at 279). This approach was essentially developed by Schloeman and Ohlhoff, ‘Constitutionalization’ and Dispute Settlement in the WTO: National Security as an Issue of Competence’, 93 *AJIL* (1999) 424, at 444. Consequently, there is no remedial law deficit as diagnosed by Perez.

²⁰⁵ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Reports (1986), 134.

²⁰⁶ *Ibid.*

turns to a unitary counter-argument, with a view to preventing a potential 'effectiveness gap' in human rights treaties: treaty mechanisms exclude the rules on state responsibility as long as they function effectively. Where this is no longer the case, states may have recourse to the remedies provided for under the general law of state responsibility. Once the exclusiveness theory has been thus discarded, we can turn to two familiar questions: Which of the mechanisms under human rights treaties are *leges speciales* to the rules on state responsibility in the first place? And how far does their specialness extend?

Human rights treaties have created innovative procedures for monitoring and enforcing compliance with the obligations under the convention. Such procedures include periodic reporting, which forces parties to justify their human rights record before treaty bodies, individual complaint procedures as well as political and judicial inter-state proceedings. To what extent are these procedures *leges speciales* to the rules on state responsibility? Conceptually, the responsibility of states arises irrespective of who has the right to invoke it and in which fashion.²⁰⁷ The various procedures have no bearing on the question whether a state is responsible for a breach. Instead, they operate on the level of invocation of responsibility, dealing with the question of who may present a claim against the responsible state and request which remedies. Thus, they compete with Articles 42 to 48 of the ILC's codification.

However, most of these procedures do *not* constitute *leges speciales* to Articles 42 to 48. Individual claims procedures are not 'concerned with the same substantive matter' as the rules of state responsibility – to pick up on Fitzmaurice's definition of special rules. The scope of the ILC Articles is limited to the right of *states* to invoke the responsibility of other states. They have no bearing on the question whether, and under which conditions, individuals are entitled to present claims or to request remedies. Vice versa, the mere existence of an individual claims procedure cannot warrant the conclusion that inter-state invocation is consequently precluded. Rather, the invocation of state responsibility then rests on two pillars.²⁰⁸

Moreover, reporting procedures cannot be deemed *leges speciales vis-à-vis* the rules on state responsibility. The Articles on state responsibility are concerned with the legal consequences of concrete breaches. Reporting procedures before treaty bodies are not. Their function is to provide a comprehensive critique of the human rights situation in a particular member state. They are designed to help improve the overall human rights record of states by using an innovative mix of judicial assessment akin to a tribunal, political pressure and legal assistance. It is true that both reporting procedures and inter-state invocation of responsibility for breaches of human rights serve the overarching goal of improving compliance with human rights standards. However, they involve different actors and operate with different techniques of

²⁰⁷ The distinction between responsibility and its invocation underlies the ILC's Articles. According to Article 1, every internationally wrongful act of a state entails that state's responsibility. Article 2 defines as a wrongful act any conduct that is attributable to a state and constitutes a breach of an international obligation. ILC, *supra* note 9.

²⁰⁸ Cf. K. J. Partsch, *Rassendiskriminierung. Die UN-Konvention und ihre Wirkungsweise* (1971) 14.

persuasion. Moreover, reporting procedures do not result in an order of specific remedies. Thus, such procedures complement the right to invoke state responsibility rather than replacing it. The fact that reporting procedures do not involve ‘the same substantive matter’ as inter-state complaints is reaffirmed by the conventions themselves. Where inter-state complaint procedures are available, such procedures exist alongside a periodic reporting system.

To reach a first conclusion: only state-to-state procedures of a judicial character that address concrete violations of the treaty are *leges speciales* to the rules on invocation of state responsibility. To the extent that a human rights treaty contains such procedures for inter-state claims, states are barred from invoking the responsibility of another state through other channels. The decision-making power of the respectively competent body must not be bypassed by unilateral auto-interpretation. Where no such procedures are provided, states are free to invoke the responsibility of a violator state pursuant to the provision of Article 48 of the ILC’s Articles as a ‘State other than an injured State’. Such a state can claim only a limited range of remedies including cessation, and guarantees of non-repetition. Moreover, it may request reparation in the interest of the persons whose rights were violated.

So far so good: What if a state fails to cease an ongoing violation of human rights or denies the victims of a human rights violation adequate reparation? The question of enforceability of human rights has remained most controversial – so much so that it almost jeopardized the adoption of the final Draft Articles by the ILC during its 2001 session. Human rights treaties do not contain special provisions regarding the right of states to enforce obligations under these treaties. In accordance with the proposition outlined above, it could be easily concluded that states have a right to ensure that international law be respected, including a restricted right to unilateral enforcement action (countermeasures). However, it has been suggested that ‘human rights are different’ and, therefore, decoupled from the general regime of legal consequences of internationally wrongful acts. The arguments advanced in support of such a contention fall within two principal streams. The first argument is a teleological one: unilateral enforcement of human rights may create ‘disorder’ in international relations, especially in light of the fact that such enforcement rights are prone to political abuse.²⁰⁹ The second argument is a doctrinal one. Given the structural non-reciprocity of human rights obligations, it is being argued, bilateral inter-state enforcement through countermeasures would be systematically flawed.²¹⁰

Human rights obligations have been characterized as ‘objective regimes’.²¹¹ As the European Court of Human Rights stated in the *Northern Ireland* case:

²⁰⁹ Frowein, ‘Die Verpflichtungen *erga omnes* im Völkerrecht und ihre Durchsetzung’, in *Festschrift für Hermann Mosler* (1983) 242, at 255; Koskeniemi, ‘Solidarity Measures: State Responsibility as a New International Order?’, 72 *BYbIL* (2001) 337, at 347.

²¹⁰ Cf. the references cited in B. Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (1972), at 176 *et seq.*

²¹¹ Riphagen, *supra* note 134, 17, para 89.

Unlike international treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'.²¹²

In our view, the Court's statement should not be interpreted as suggesting that human rights are of a non-reciprocal character. While human rights have an objective, public-law-like, perhaps even constitutional,²¹³ character, technically, they nonetheless formally remain 'reciprocal engagements between contracting States'.²¹⁴ It is crucial to distinguish between reciprocity as a formal characteristic of a norm on the one hand, and reciprocity as a substantive *do-ut-des* relationship on the other. Human rights treaties do not involve such a substantive exchange, since their ultimate beneficiaries are individuals under the jurisdiction of the state undertaking the obligation. However, since human rights remain 'mutual, bilateral undertakings' owed to the other state parties to the respective convention, there is no compelling systematic reason why states should be precluded from bilateral enforcement of human rights.²¹⁵ In Michel Virally's words: '*Chaque Etat partie à un tel traité a le droit d'exiger des autres parties qu'elles respectent ces engagements, pris envers lui-même.*'²¹⁶

As to the second strand of argument, are countermeasures prone to creating particular disorder if they are employed with the purpose of inducing compliance with human rights obligations? From a developed country perspective, Jochen Frowein expressed the concern that unilateral enforcement would create considerable legal uncertainty.²¹⁷ Koskenniemi added (with a surprising touch of Morgenthau-style realism) that elevating the enforcement of human rights from politics to the level of law 'would vest diplomacy with pressures and expectations it cannot carry'.²¹⁸ Authors from developing countries, by contrast, stress the danger of political coercion of developing countries by rich and powerful states.²¹⁹ While it is true that countermeasures for the enforcement of human rights have so far remained a domain of

²¹² *Ireland v. UK*, European Court of Human Rights, Ser. A Vol. 25 para. 239.

²¹³ In its decision in *Chrysostomos and others*, the European Commission spoke of a 'constitutional instrument', 34 *Ybk European Commission on Human Rights* (1991) 35, at 52 *et seq.*

²¹⁴ Cf. generally, Simma, *supra* note 123; B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994, VI) 217, at 373.

²¹⁵ Provided, of course, that the human rights treaty's rules on invocation of responsibility have been exhausted, cf. *supra* Sections 3C and 3D.

²¹⁶ M. Virally, 'Le principe de réciprocité dans le droit international contemporain', 122 *RdC* (1967, III) 1, at 26. 'Every State Party to such a treaty has the right to require the other parties to respect these commitments, which have been made to the State itself.'

²¹⁷ Frowein, *supra* note 209, at 256. Frowein's analysis is strongly influenced, however, by the conflicting interpretations of human rights by capitalist countries on the one hand and socialist countries on the other hand. His critique may be largely obsolete after the collapse of the East Bloc.

²¹⁸ Koskenniemi, *supra* note 122, at 347. However, the focus of Koskenniemi's critique is the attempt to *codify* countermeasures in the collective interest, rather than the existence of such measures.

²¹⁹ Cf. the discussion in Crawford, *supra* note 86, Add.4, 16 and 18, who concedes that there is 'a due process issue' from the perspective of the targeted state if a few powerful states decide to act as a kind of human rights police for the world, based on their auto-interpretation of human rights law; cf. Koskenniemi, *supra* note 131, at 347.

‘Western’ industrialized states,²²⁰ Christian Tomuschat has argued that the regime of countermeasures ‘does not place new States in a position of inferiority’,²²¹ pointing out as an example that developing countries could freeze foreign assets to induce compliance.

The ILC drafting committee had proposed in the year 2000 a provision pursuant to which ‘any State may take countermeasures, in accordance with the present Chapter in the interest of the beneficiaries of the obligation breached’.²²² To accommodate the concerns of developing countries, the draft contained various safeguards to prevent political abuse, including a provision that would restrict such countermeasures to ‘gross and systematic’ violations of human rights obligations.²²³ However, the proposal was received critically by a majority of states in the Sixth Committee of the General Assembly. Thus, in its 2001 session, the ILC sought a compromise that would eliminate the risk that the Assembly would not ‘pass’ the Draft Articles. The final Article 54, a general saving clause, is an attempt to leave the question open without prejudicing the evolution of a future *opinio juris* regarding the permissibility of countermeasures in the collective interest.²²⁴

In our view, the ILC draft of 2000 may still provide valuable guidance as to what the evolving law on countermeasures in the collective interest could look like. There is no return to an international law that puts on an indifferent face to human rights. Human rights can no longer be fenced in an exclusive *domaine réservé*; once their genie was out of the bottle, human rights necessarily transcended to the realm of general international law. As Reisman put it, human rights are ‘more than a piecemeal addition to the traditional corpus of international law’. They bring about ‘changes in virtually every component’.²²⁵ Against this backdrop, it is only logical not to deny states the means to induce compliance with obligations under human rights treaties, once the collective enforcement mechanisms of the treaty have failed.²²⁶ The concerns raised by some authors (and states) neglect the realities of human rights protection: so far, states have hardly shown the excessive human

²²⁰ Cf. the cases compiled in the ILC commentary on Article 54, *supra* note 11, at 351 *et seq.*, and the cases compiled by K. Weschke, *Internationale Instrumente zur Durchsetzung der Menschenrechte* (2001), at 98 *et seq.*

²²¹ Tomuschat, ‘Are Counter-measures Subject to Prior Recourse to Dispute Settlement Procedures?’, 5 *EJIL* (1994) 77, at 78.

²²² Article 54 of the Draft Articles provisionally adopted by the Drafting Committee on second reading, A/CN.4/L.600.

²²³ Article 41 of the Draft Articles provisionally adopted in 2000 restricted countermeasures to wrongful acts ‘that constitute a serious breach’, meaning a ‘gross and systematic failure by the responsible State to fulfil its obligation, risking substantial harm to the fundamental interests protected thereby’. Draft Articles 51 to 53 spelled out limitations similar to 49 to 53 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 9.

²²⁴ Cf. Simma, ‘Staatenverantwortlichkeit und Menschenrechte im ILC-Entwurf 2001’, in J. A. Frowein, K. Scharioth, I. Winkelmann, R. Wolfrum (eds), *Verhandeln für den Frieden – Negotiating for Peace, Liber Amicorum Tono Eitel* (2003) 423.

²²⁵ Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’, 84 *AJIL* (1990) 866, at 872.

²²⁶ Concurring, L. A. Sicilianos, *Les réactions décentralisées à l’illicéité* (1990) 167; Weschke, *supra* note 220.

rights ‘vigilantism’²²⁷ dreaded by some. Far from obsessively policing human rights violations across the world,²²⁸ the attitude of states towards human rights violations is all too often characterized by a remarkable lack of vigour to counter such treaty breaches.

5 The Dialectics of ‘Multiple Unity’

While international law has in many respects transformed ‘*de la pyramide au réseau*’,²²⁹ from a small but organized body of general rules to a spread-out web of normativity, this transformation has been premised on the stability of the systemic framework of the international system as a whole. Unity and multiplicity, stability and change mutually condition each other. On the one hand, new special regimes of international law have evolved as a response to insufficiencies or the perceived lack of flexibility of the general system. On the other hand, the very same regimes that have thus emancipated themselves from general international law remain dependent on this body of rules in a number of ways, including, as a measure of last resort, the enforcement of primary obligations. In other words, the fragmentation of the international legal order requires a simultaneous affirmation of its central systemic building blocks, including general international law. As Matthew Craven put it, ‘[a]s a diachronic narrative, therefore, progressive systematization appears in tension with that of fragmentation. . . . A system is a system by reason of its ability to unify a diversity of experience – it must be simultaneously homogeneous and heterogeneous, unified but multipolar.’²³⁰

Legal practice involves operationalizing the dialectics inherent in the multiple unity of international law. Jurists need to acknowledge the particular logic of a variety of special regimes. The sophisticated institutional arrangements of such regimes will often render the expertise of the general international law practitioner largely futile. At the same time, however, general international law provides a systemic fabric from which no special legal regime is completely decoupled. And, by framing a prescription in legal terms, states have opted to subordinate a particular issue to the logic of international law as a whole. Framing policy choices in terms of international treaties inevitably involves a shift from the ‘ethos of the diplomat’ to the ‘rule of the lawyer’.²³¹ General international lawyers should not be too reluctant to assert their role.

²²⁷ McCaffrey, ‘*Lex Lata* or the Continuum of State Responsibility’, in J. H. H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of State* (1989) 244.

²²⁸ For instance, in the history of the European Convention, states have generally lodged inter-state complaints almost exclusively in situations where their interests were specially affected. The two exceptions were the application against Greece in 1967 (11 *Yearbook European Commission on Human Rights* (1968) 691; 12 (II) *Yearbook European Commission on Human Rights* (1969)), and the application against Turkey in 1982 (applications no. 9940-9940/82).

²²⁹ Cf. the title of a recent book by Ost and van de Kerchove, *supra* note 5. ‘From the pyramid to the network’.

²³⁰ Craven, ‘Unity, Diversity and the Fragmentation of International Law’, XIV *Finnish Yearbook IL* (2003) 3, at 12.

²³¹ To play on a theme once developed by Weiler, *supra* note 178.